IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

v.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-_____

REV. CHARLES H. NEVETT; REV. JOHN A. Salary, and ERNEST McLIN, individually and on behalf of all those similarly situated,

Petitioners,

vs.

LAWRENCE G. SIDES, individually and in his capacity as Mayor of Fairfield, Alabama; GRADY ELLISON, individually and in his capacity as City Clerk of Fairfield, Alabama; and WILLIAM J. BAXLEY, individually and in his capacity as Attorney General of the State of Alabama; THE CITY OF FAIRFIELD, a municipal corporation; and JAMES H. SIMS, VERA BELL, BILL GILMORE, CARL H. KILGORE, JOHN E. PHILLIPS, HENRY HARDY, CHARLES A. WILLIAMS, GEORGE W. SCOREY, JR., JERRY F. MAPLES, T.S. SMITH, CLIFTON L. WOOD, JR., GORDON JONES and GRADY ALEXANDER as members of the Fairfield City Council and their official successors,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinions and judgments of the United States Court of Appeals entered in the above-styled cause on March 29, 1978 and June 8, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 571 F.2d 209 and is reproduced in the separately bound appendix at 1a. The

opinion of the United States District Court for the Northern District of Alabama was published as an appendix to the court of appeals opinion, reported at 571 F.2d 229, and is reproduced at 59a. The previous appeal in this cause, opinion rendered June 8, 1976, is reported at 533 F.2d 1361, and is reproduced at 90a. Likewise, the district court opinion there reviewed was published as an appendix to the court of appeals opinion, published at 533 F.2d 1366. It is reproduced at 103a.*

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 29, 1978. A timely petition for rehearing and suggestion for rehearing en banc was denied on May 25, 1978. By order of

*These four opinions will be referred to as follows:

Second court of appeals opinion--Nevett II
Second district court opinion --Nevett B
First court of appeals opinion --Nevett I
First district court opinion --Nevett A

Additionally, an unpublished order was entered on June 30, 1976, denying rehearing from Nevett I and also refusing to review the district court proceedings after remand. It is reproduced at 142a.

August 9, 1978, Justice Lewis F. Powell, Jr., extended the time for filing a petition for writ of certiorari to and including September 22, 1978. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section I of the Fourteenth Amendment of the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section I of the Fifteenth Amendment of the Constitution of the United States:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude--

The statute at issue is now codified as Ala.Code, §11-43-40 (1975).* It is reproduced in full

*Formerly Ala.Code. tit. 37, §426. It was recodified with editorial but no substantive changes. See, 3a, for former language.

beginning at 144a, but in pertinent part reads:

> (a) In cities having a population of 12,000 or more, the following officers shall be elected . . .:
>
> (1) In cities having seven wards or less, a president of the city council and two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except, that in such cities having a population of less than 20,000 the two aldermen from each ward shall be elected by the electors of the city at large.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a finding that dilution of the minority vote does not exist may be premised on a conclusion that blacks could be successful at the polls if they worked harder than whites.

2. Whether the defendants in a voting rights case alleging dilution of the black vote prevail when the district court makes a finding of "ultimate fact" that dilution has been proved in accordance with the standards set out in White v. Regester, 412 U.S. 755 (1973), though not proved when considered under precedents of the court of appeals.

3. Whether the plaintiffs in a voting rights case brought under the fourteenth and fifteenth amendments alleging dilution

of minority voting strength must prove that the defendants or their predecessors had an intent to discriminate against blacks by means of the at-large system of voting.

4. If intent must be proved in such cases, did the court of appeals apply the proper standard of proof.

STATEMENT OF THE CASE

Fairfield is an industrial suburb of Birmingham, originally a planned community for the workers of Tennessee Coal and Iron Company (now part of the United States Steel Corporation). Of the city's 14,369 residents approximately 48% are black. The city is governed by a mayor and a thirteen-member city council, all of whom are elected at large. There are residence requirements for twelve of the council members: two must reside in each of six wards and are elected from numbered places, e.g., Ward 2, Place 1.

In 1968 black candidates won six of the 13 council positions, but in 1972 all blacks were defeated at the polls by a city-wide white majority despite their usually carrying their own wards. The petitioners (plaintiffs below), three

black Fairfield residents, brought suit alleging that the at-large election system diluted their voting strength in violation of the fourteenth and fifteenth amendments of the Constitution and 42 U.S.C. §§1981 and 1983. Jurisdiction was vested in the district court by 28 U.S.C. §§1343, 2201 and 2202.

On the trial of the case, the district court found that the at-large election system coupled with racially polarized voting "operate[s] to minimize or cancel the voting strength of the blacks in the City of Fairfield," Nevett A, 122a. The district court made explicit findings under each of the criteria set out in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub. nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), but found it necessary to return to the "basic standards" of White v. Regester, 412 U.S. 755 (1973). 122a.[1]

1. Both sides appealed; the defendants appealing the finding of dilution and the plaintiffs the remedy to be implemented.

The Nevett I court did not hold that this ultimate conclusion was incorrect,[1] but held it could not "affirm the ultimate conclusion of a dilution without findings of fact to fit proper standards" as enumerated in Zimmer v. McKeithen. Nevett I, 100-01a. It remanded for reconsideration of the findings of fact "according to the indicia of dilution stated in Zimmer and other cases," Nevett I, 102a.

On remand, the district court made new findings under the Zimmer criteria,[2] and concluded that the plaintiffs had not made out a case. The court then made a finding of "ultimate fact" that plaintiffs had established a case of dilution of black voting strength under White v. Regester, but that the court understood it was in error in failing to apply the Zimmer standards as "the determinants" of dilution. Nevett B, 63-4a.

1. In fact, the court of appeals held that the findings could not be set aside as clearly erroneous. Nevett I, 96a.

2. No additional evidence was taken. The Nevett I decision was on June 8, 1976 and Nevett B on June 11, 1978.

The Nevett II Court again found the findings of fact to be not clearly erroneous, Nevett II, 54a, but the court of appeals never addressed the difference the district court perceived between the White v. Regester criteria and the Zimmer factors. The second district court conclusion was affirmed.

Nevett II also held that racially discriminatory intent is a necessary element of proof of dilution. The court of appeals then held that proof of the Zimmer factors would satisfy the intent requirement which it believed Washington v. Davis, 426 U.S. 229 (1976), imposed.

The black/white population of Fairfield is nearly even. Until 1968, no blacks ever held elective office in the city. 106-07a. With the assistance of federal registrars, blacks achieved that year a 53 percent majority of registered voters, 108-09a, 122a, and elected six blacks to the thirteen member city council. All blacks were defeated at the polls in 1972. By the time of Nevett A, blacks were 48 percent of the registered voters. 122a.

> The [district] court attributed the marked disparity in these results [of the 1968 and 1972 elections] not to any invidious racial discrimination but rather to the failure of blacks to turn out a higher percentage in 1972.25
>
> 25. As the district court stated in its opinion on remand, "[t]he failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places." Nevett II, 50a.

This finding of no discrimination was posited in a fact-finding that in order to win elections, blacks would have to turn out at a higher rate than whites.

In Nevett A, the district court found that the city council was "far more" responsive when blacks were on the council, 119a, "but there has not been a total lack of responsiveness merely because

there were no blacks on the city council." 120a. In Nevett B, that court said that while blacks "fared less well during an all-white city administration than under the laws of chance," 60a, unresponsiveness was not established because this must be a "condition or quality of being unresponsive, and is not established by isolated acts of being unresponsive." 60a. The "isolated acts" included, inter alia, one to three blacks out of sixty employed among civil service, fire and police positions, 118a, no blacks appointed to boards or agencies until 1964, 106a, and then only one board (relating to the financing of a predominantly black college) with a black majority, 117a. The district court found "some conscious characterization by city officials to the effect that boards would not become majority dominated by blacks, but only minority." 117a. These findings on responsiveness were affirmed.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS OPINIONS HERE DEPARTED FROM WHITE V. REGESTER, 412 U.S. 755 (1973), AND OTHER HOLDINGS OF THIS COURT.

A. Fifth Circuit precedent since White v. Regester.

This Court has dealt with the constitutionality of multi-member district systems only twice where race was a relevant factor in the Court's decision: Whitcomb v. Chavis, 403 U.S. 124 (1971), and White v. Regester, 412 U.S. 755 (1973).

White affirmed a finding of dilution on findings of fact by the district court that included past official discrimination touching the franchise, education, employment, economics, health, politics, etc., majority vote and "place" statutes, failure to elect blacks, slating, lack of need for black electoral support, unresponsiveness, and racial campaigns. 412 U.S. at 766-68. The fifth circuit has distilled its own touchstone formula, Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976)(per curiam).

Zimmer identified four major factors to be considered by district courts as contributing to the existence of racial dilution:

(a) lack of minority access to the process of slating candidates;[1]

(b) unresponsiveness of legislators to the particularized interests of the minority;

(c) a tenuous state policy underlying the preference for multi-member districting;[2] and

(d) the existence of past discrimination which precludes effective participation in the election system.

If these factors are proven,

> a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical sub-districts.
> 485 F.2d at 1305.

The court of appeals noted that the aggregate of these factors establishes the case. The court did not say how much proof is needed to prevail. This test has been utilized numerous times by the fifth circuit to test the correctness of the analysis (but not the result) of district court opinions.[1]

A later en banc decision marks the next significant reconsideration of this question by the court of appeals: Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977). In Kirksey, the court restated the factors or issues to be considered in different language than in Zimmer, and held for the first time that similar factors, not just the ones stated

1. In Turner v. McKeithen, 490 F.2d 191, 194 (5th Cir. 1973), the fifth circuit made clear that this factor also includes "the opportunity for the minority group to participate in the candidate selection process" and election.

2. The court held that the state policy must be "divorced from the maintenance of racial discrimination." 485 F.2d at 1305.

1. Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976); McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976); Gilbert v. Sterrett, 509 F.2d 1389 (5th Cir. 1975): Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974); Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621 (5th Cir. 1974); Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973).

in Zimmer, could be used, but retained the "aggregation" language. 554 F.2d at 143. The Kirksey court also utilized a prima facie case concept, at least for the issue of past discrimination precluding effective participation in the political process. The court held that

> Once plaintiffs established a past record of racial discrimination and official unresponsiveness . . ., it then fell to the defendants to come forward with evidence that . . . there was presently equality of access.
> 554 F.2d at 144-5.

Finally, the court considered the effect of Washington v. Davis, 426 U.S. 229 (1976), and Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), on the holding in White v. Regester, supra, and concluded

> the Dallas and Bexar County plaintiffs in White v. Regester were successful, even though they did not prove the plan in question was a Gomillion v. Lightfoot [364 U.S. 339 (1960)] type of racial gerrymander, because they established the requisite intent or purpose in the form of the existent denial of access to the political process.
> 554 F.2d at 148.

Because intent is shown by present denial of access, which in turn is proven by an unrebutted record of past discrimination, including unresponsiveness, the next step was to hold that proof of intent was required, which is what Nevett II did. 24-5a.

B. The Court of Appeals Failed to Apply the Law of Burden Shifting as Required by Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977), and Previous Elections Decisions.

While at-large election schemes are not per se unconstitutional they can easily be utilized to dilute the voting strength of minorities. Racially polarized voting, though unfortunate, United Jewish Organizations v. Carey, 430 U.S. 144 (1977), is often a reality, Most black elected officials are elected from majority black districts.

White v. Regester, 412 U.S. 755 (1972), and Whitcomb v. Chavis, 403 U.S. 124 (1971), indicate that the order of proof in challenging an at-large system is that plaintiffs need to show:

1. racially polarized voting that, combined with the at-large system, operates to deprive the minority of the seats it could be expected to win with single-member districts.

2. That blacks have had less opportunity than did other residents to participate in the political process.

These are key elements necessary to find the ultimate issue of unconstitutional dilution of the franchise. Lack of access to the political process can be proved by the whole panoply of factors (and others) as listed in White. Bloc voting and failure at the polls are obviously relevant to lack of access. If intent is required, then it can be shown by proof of the above, for when it becomes apparent that the election machinery has the discriminatory impact, the choice of electoral scheme abets the impact in a knowing manner. It can be particularly established by proof of past discriminatory conduct the effect of which has not abated, Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977).[1]

1. Of course, factor one plus intent would alone prove unconstitutional dilution.

With this, a prima facie case of discrimination is established. The burden should shift to the defendants to show by a preponderance of the evidence, Mt. Healthy City School District v. Doyle, 429 U.S. 274, 287 (1977), that either plaintiff's evidence is wrong or outweighed, or that the past denial of access to the political process has been dissipated. Kirksey, supra, at 144-45. See also, Gaffney v. Cummings, 412 U.S. 735, 745 (1973).

The "aggregate of factors" test developed in Zimmer and applied in Nevett II simply does not follow the burden of proof procedure compelled by this Court. It does not compel the district court to decide, initially, whether a prima facie case has been made out. Thus the evidence of non-dilution, etc., is never weighed by the preponderance of evidence test, with the burden resting upon the defendants. The aggregate test compels the weighing of factors, some of which work in favor of defendants in a particular case, when the presumption is still in favor of

defendants.[1]

In sum, no matter how strong the prima facie evidence of dilution presented, the court of appeals never weighs the totality of the evidence of the defense by the preponderance of the evidence test. This works to the detriment of the challenging parties, and merits review by this Court.

1. A prime example is proof of slating. Because it existed in White v. Regester, the court of appeals always mentions this as one factor. Overt slating as in White v. Regester seldom exists, but the court of appeals compels the consideration of its non-existence as a positive element of non-dilution. If it once existed but was voluntarily removed, it would be evidence of lack of intent, and if it does exist it would be denial of access evidence. But if slating never existed it should have no weight.

Petitioners do not assert that plaintiffs' evidence cannot be the basis for inferences drawn against them, Wright v. Rockefeller, 376 U.S. 52, 57 (1964), but that it is evidentiarily inaccurate to use absence of a factor, which has no relevance to the jurisdiction, as a basis for such inferences.

C. The Court of Appeals Failed to Apply the Strict Scrutiny Test to the Evidence as Required by This Court.

Where the right to the elective franchise is involved,[1] or where there is proof of racial discrimination,[2] the courts are to apply careful judicial scrutiny to the evidence. In measuring deviations in districting cases, both the "character as well as degree of deviation" are subject to careful judicial scrutiny. Reynolds v. Sims, 377 U.S. 533, 581 (1964)(emphasis added).[3] The court of appeals test at

1. Reynolds v. Sims, 377 U.S. 533 (1964); Gray v. Sanders, 372 U.S. 368 (1963); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969).

2. In Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977), this Court said that "[w]hen there is proof that a discriminatory purpose has been a motivating factor," then at that point judicial deference to other state policies is no longer justified. If strict scrutiny in non-fundamental rights matters is not to be applied until a prima facie case of discrimination is found, then it is all the more important, as argued in section I.B above, that this determination be made.

3. Indeed, any rationale supporting such deviations must be "free from any taint of arbitrariness or discrimination." Mahan v. Howell, 410

(Footnote continued on next page)

issue here does not apply such scrutiny, though there is nothing in White v. Regester, 412 U.S. 755 (1973) or Whitcomb v. Chavis, 403 U.S. 124 (1971), to indicate that a lower standard of review should be applied.

Petitioners do not contest that the basic fact findings, e.g., whether there are numbered post requirements, are to be reviewed by the clearly erroneous rule. But when the district court is to determine by the aggregate of the factors whether both denial of access to the political process and intent to discriminate exist, the rule does not shield these as findings of fact. Proof of intent "demands a sensitive inquiry into such circumstantial and direct evidence as may be available," Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977), not only by the district court but also by any reviewing court. Additionally, the ultimate conclusion as to whether or not unconstitutional dilution exists is

(Footnote continued from preceding page)
U.S. 315, 325 (1973) quoting Roman v. Sincock, 377 U.S. 695, 710 (1964). Where racial dilution is claimed on an at-large election system with a substantial minority population, such a plan would seldom be totally free of such taint. Cf. United Jewish Organizations v. Carey, 430 U.S. 144 (1977).

not subject to the clearly erroneous rule. See, Neil v. Biggers, 409 U.S. 188, 193 n. 3 (1972); the ultimate conclusion here must be subjected to strict scrutiny. The court of appeals here limited its review to the clearly erroneous rule.

The standard of review applied by the court of appeals affirmed a finding of "responsiveness" on a definition that required this factor be proved as "a total lack of responsiveness," supra, 9, and that black voters were not diluted because they could win elections if black voters turned out at a rate higher than whites, supra, 9. These findings contravene White v. Regester and would not withstand careful judicial scrutiny. The court of appeals departure from White v. Regester and other decisions of this Court merits full review.

II. REVIEW SHOULD BE GRANTED TO DECIDE THE NECESSITY AND NATURE OF PROOF OF INTENT IN CASES ALLEGING DILUTION OF A RACIAL GROUP'S VOTES.

A. Wright v. Rockefeller, 376 U.S. 52 (1964) does not require proof of intent.

The court of appeals relied upon the citation by this Court of Wright v. Rockefeller, 376 U.S. 52 (1964), in both Washington v. Davis, 426 U.S. 229 (1976) and Village of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252 (1977), for the conclusion that this Court considered intent to be a requirement in election cases.[1] Wright does not compel such a conclusion.

The Wright plaintiffs claimed that four Manhattan congressional districts had been racially gerrymandered because one was 86.3% black and Puerto Rican and the others had less than 25% non-whites. Because the relief sought would probably have been four white-dominated districts, it is nor surprising that a Negro Congressman intervened as a defendant. 376 U.S. at 53. Plaintiffs' only claim was an intent to segregate and they failed to prove their case.

1. Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, 434 U.S. 968 (1977), did not expressly decide the issue. Assuming intent was required, it found intent. 554 F.2d at 147-48.

While citation of Wright in Davis and Arlington Heights may lend credence to the broad conclusion that intent must be shown, such a conclusion must also assume that this Court omitted the element of intent when it wrote in White v. Regester, 412 U.S. 755, 766 (1973):

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice.

It is petitioners' position that the element of intent was not inadvertently omitted in White v. Regester. But if they are in error, this issue merits plenary consideration by this Court.

B. Racial dilution of the elective franchise in at-large districts is not sui generis, apart from other elective franchise issues.

The court of appeals held that dilution cases speak to the quality of representation while Reynolds v. Sims, 377 U.S. 533 (1964), and other malapportionment

cases are quantitative and therefore do not require proof of intent. Nevett II, 11a. Reynolds, as well as Whitcomb, concerns the dilution of the franchise. "Debasing" and "diluting" are impermissible, 377 U.S. at 567, whether by districts of unequal size or by submerging votes.

> Simply stated, an individual's right to vote . . .is unconstitutionally impaired when its weight is in a substantial fashion diluted. . . Reynolds v. Sims, supra, 377 U.S. at 568.

The court of appeals stated that, in single-member district cases, mathematical comparisons are the issue and "no showing of discrimination along racial, ethnic, or political lines need be shown." Nevett II, 11a. The plaintiffs' burden in all fourteenth amendment cases, under precedents of this Court, is to make out a "prima facie case of invidious discrimination." Gaffney v. Cummings, 412

U.S. 735, 745 (1973). In single-member district challenges, invidious discrimination can be shown solely by population variances.

> It is clear, however, that at some point or level in size, population variances do import invidious devaluation of the individual's vote and represent a failure to accord him fair and effective representation. (Emphasis original.) White v. Weiser, 412 U.S. 783, 792-93 (1973).

Variations may be so small as not to be prima facie evidence of discrimination. Gaffney v. Cummings, supra. If large enough, the burden of proof then shifts to the defendants, and they may be able to justify the variations. Mahan v. Howell, 410 U.S. 315 (1973). Plaintiffs have no burden of showing lack of good faith or intent to discriminate--they need show only the effect, an effect which imports invidious discrimination.

There is no apparent reason for changing the rules of proof for multi-district submergence cases as the court of appeals held. If plaintiffs show that the effect of an at-large system is submergence of the black minority

vote, they have made out a prima facie case of invidious discrimination and the burden of proof should shift to defendants to justify their electoral scheme.

This Court should also consider the holding of Nevett II that intent is an element of proof required under the fifteenth amendment. This narrow amendment[1] concerns race and the elective franchise, "a fundamental political right. . .preservative of all rights." Reynolds v. Sims, 377 U.S. 533, 562 (1964).

C. The elective franchise involves a fundamental right, subject to strict scrutiny. If intent to discriminate must be shown, it can be found in the structure of the electoral scheme.

> [T]he right to exercise the franchise in a free and unimpaired manner is preservative of all other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.
> Reynolds v. Sims, 377 U.S. 533, 562 (1964).

1. Compare, Washington v. Davis, 426 U.S. 229, 248 (1976).

This case is illustrative of the confusion of the courts subsequent to White v. Regester, 412 U.S. 755 (1973). The first time around, the district court felt there was no need to prove intent. 114a. Nevett I did not dispel this belief. Intent was joined as an issue only on the second appeal.[1]

If intent is a necessary element, it need not be that purposefulness found necessary in Screws v. United States, 325 U.S. 91 (1945). The state of mind of the defendants is not a consideration, Hernandez v. Texas, 347 U.S. 475, 482 (1954) ("The result bespeaks discrimination, whether or not it was a conscious decision. . .").[2]

1. If intent is necessary, petitioners strenuously urge review by this Court to define what is needed for this element, in order to assist both litigants and triers of fact.

2. This is not to say that a defendant's testimony as to purpose would be entitled to no weight. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

Like jury discrimination cases, once disproportionate results and opportunity to discriminate is shown, the necessary intent to discriminate is inferred and a prima facie case of discrimination is established. E.g., Alexander v. Louisiana, 405 U.S. 625 (1972). Public officials are deemed to be aware of the unrepresentativeness of jury lists, as they must be deemed to be aware of their own unresponsiveness to minority interests and racial bloc voting. This rule is efficacious in such cases because there can be few reasons for the results.[1] Likewise in election cases there are a limited number of reasons for a particular electoral scheme. In both it is open to defendants to explain the reasons in rebuttal. Alexander v. Louisiana, 405 U.S. 625, 632 (1972). Review should be granted to settle these important issues in this fundamental area of law.

1. In comparison, there are many good reasons why a teacher is dismissed or a zoning change not made. It is less easy to perceive the intent of the public officials in such cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment below.

Respectfully submitted,

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Reverend Charles H. NEVETT et al., Individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

Lawrence G. SIDES, Individually and in his capacity as Mayor of Fairfield, Alabama, et al., etc., Defendants-Appellees.

No. 76-2951.

United States Court of Appeals, Fifth Circuit.

March 29, 1978.

Rehearing and Rehearing En Banc Denied May 25, 1978.

Appeal from the United States District Court for the Northern District of Alabama.

Before WISDOM, SIMPSON and TJOFLAT, Circuit Judges.

TJOFLAT, Circuit Judge:

This is the first of four consolidated cases we decide today.[1] In all of them

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1. The other cases are Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).

black voters challenge municipal election schemes that provide for the at-large election of certain city officials. The gravamen of their claims is that the black vote in each of the municipalities is submerged in an unnecessarily large, city-wide electorate and consequently that they are unconstitutionally deprived of their right to effective political participation in each of these cities.

Black residents of Fairfield, an industrial suburb of Birmingham, Alabama, brought this action to strike down their city's municipal election system, which provides for the at-large selection of a city council president and city councilmen.[2] These plaintiffs (appellants here) claim that Fairfield's at-large system, as applied, acts to dilute their voting power in violation of the fourteenth and fifteenth amendments to the Constitution.[3]

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2. This case is before us for the second time. The first panel reversed and remanded the district court's judgment for the black residents. Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976). On remand, the district court rendered judgment in favor of the city, and the black residents took this appeal.

3. These plaintiffs brought suit under the authority of 42 U.S.C. §§1981 and 1983 (1970). (Footnote continued on next page)

A council consisting of twelve aldermen and a president governs the City of Fairfield. State law allows cities the size of Fairfield, which had a population of 14,369 in 1970 (48 percent of which was black), to divide themselves into wards for the purpose of city government.[4]

(Footnote continued from preceding page)
Record, vol. 1, at 1. They allege no additional statutory violations. Therefore, this case does not present the issue, discussed at length in Judge Wisdom's special concurrence, whether Congress intended in the Voting Rights Act to go beyond the protection provided by the Constitution and invalidate at-large voting schemes, like that of Fairfield, that are not illicitly motivated. See part II infra.

4. The applicable statute is Ala.Code tit. 37, §426 (Supp. 1973). It has remained substantially unchanged, except for the specific population categories, since its original enactment in 1909. Section 426 provides as follows:

> Election of president of council and aldermen.--In cities having a population of twelve thousand or more, there shall be elected at each general municipal election the following officers, who shall compose the city council for such cities, and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members: A president of the city council, and in cities having seven wards or less, two aldermen from each ward, to be elected by the qualified voters

(Footnote continued from preceding page)
of the several wards voting separately in every ward, except in cities of less than twenty thousand population, in which two aldermen from each ward shall be elected by the electors of the city at large, in cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen fourteen exclusive of the president of the council, and in cities having fifty thousand population or more the city council may create not exceeding twenty wards. The president of the council shall have the right to vote on all questions the same as any other member of the council. Provided however, that the city council of any city having a population of twelve thousand or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large. And provided further, that the city council of any city having a population of more than thirty thousand, according to the last or any subsequent federal decennial census, or according to any census of such city made pursuant to article 3 of chapter 10 of this title, or Act No. 845 of the Acts of 1953 (sections 481(1) and 481(2) of this title,) and having only five wards, may, by ordinance or resolution adopted by two-thirds vote of the city council, at least six months prior to a general municipal election, provide that the city council shall consist of a president and five aldermen. If such an ordinance or resolution is adopted one alderman shall reside in each of the respective wards of the city, the president and all the aldermen shall be elected by the voters of the city at large, and the president shall vote only in case of a tie.

Cities may choose the number of wards and thereby determine whether the aldermen (who must reside in their respective wards) are elected at-large or separately from their wards. Fairfield sectioned itself into six wards and was thus required to elect at-large two aldermen from each ward.[5]

Prior to 1968, no black had been elected to the city council, but in that year six of the seven black candidates succeeded. In 1972, none of the eight black candidates were elected to the council. According to the district court, these disparate election results can be attributed to racially polarized voting by an electorate in close and changing racial balance.[6]

5. Neither the record nor the briefs indicate when Fairfield opted to section itself into six wards. The state statute granting municipalities the option of determining the number of wards was originally enacted in 1909. 1909 Ala.Acts 100. Since neither appellants nor appellees emphasized the issue of when Fairfield exercised its option, we will assume that at all times relevant to this appeal Fairfield had six wards and elected its aldermen at-large.

6. Population figures are not available for the election years 1968 and 1972. In 1970, the year of the decennial census, blacks constituted 48 percent of Fairfield population but at least 50 percent of its registered voters. See Nevett v. Sides, 533 F.2d 1361, 1365 n. 3 (5th Cir. 1976).

The complaint in this action was filed on May 30, 1973, alleging that "such absolute control of the city government by one race" in an at-large setting worked an unconstitutional dilution of black votes. The case was tried on February 20, 1975, and, after the consideration of voluminous evidence, the district court ruled in favor of the plaintiffs, dictated into the record its findings of fact and conclusions of law, and ordered the parties to file reapportionment plans by May 1, 1975. The parties submitted plans and a hearing was held to consider them. The district court entered its final judgment on June 6, 1975, ordering the city divided into eight single-member council districts but allowing the at-large election of a city council president.[7] The judgment was appealed, and on June 8, 1976, a panel of this court vacated and remanded it, Nevett v. Sides, 533 F.2d 1361 (5th Cir. 1976), for failing to apply properly the voting dilution standards set forth in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Board v.

7. The district court's original findings of fact and conclusions of law are reported as appendices to our prior opinion, Nevett v. Sides, 533 F.2d 1361, 1366-76 (5th Cir. 1976).

Marshall, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976),[8] where we enunciated a set of factors that when established in the aggregate, are probative of unconstitutional dilution.

The district court's error was that having found "the various standards and indicia prescribed by the appellate court [not] helpful one way or the other," it nevertheless held that the plan unintentionally "does act to inhibit and has inhibited voting strength" and that "in practice it has worked that way." We held this finding insufficient to support a conclusion of unconstitutional dilution. A finding of dilution, we noted,

> must be based on the criteria that the Zimmer and Wallace [v. House, 515 F.2d 619 (5th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976)] courts distilled from White v. Regester,

8. The Supreme Court affirmed, "but without approval of the constitutional views expressed by the Court of Appeals." 424 U.S. at 636, 96 S.Ct. at 1085. Notwithstanding, Zimmer continues to control dilution cases in this circuit. Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 251-252.

> 412 U.S. 755, 765-767, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314, 324-325 (1973) and in accordance with all later cases. Unless those criteria in the aggregate point to dilution, i.e., if the criteria 'don't really help', then plaintiffs have not met their burden and their cause must fail.

Nevett v. Sides, 533 F.2d at 1365.

On remand, the district court carefully reexamined its findings of fact (no additional evidence was taken by the court) and considered the Zimmer criteria with specificity.[9] The court ultimately concluded that those findings did not demonstrate an unconstitutional dilution of the black vote in Fairfield. Judgment was entered for the defendants on June 11, 1976, and the plaintiffs took this appeal.

In this appeal, the parties present the following issues for our determination: (1) whether a finding of intentional discrimination is required in a voting dilution case brought by a racial group, (2) whether the district court's findings of fact under the Zimmer criteria are reversible, and (3) whether the district court as a matter of

9. The district court's opinion on remand is set forth in full in the appendix to this opinion.

law correctly interpreted Zimmer and subsequent relevant precedents. Since these issues are complex and significant, we think it appropriate to outline briefly how our analysis will proceed.

In Part I we discuss the nature of voting dilution cases and the legal principles governing their determination. This discussion provides the necessary background for Part II, where we examine the first issue raised here, whether intentional discrimination need be shown to make out a case alleging dilution of the voting power of a cognizable racial element. We hold that a showing of intent is necessary to establish such a case.

Our holding is based on consideration of both the fourteenth and fifteenth amendments. We determine that the recent Supreme Court decision in Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 2d 597 (1976), requires a showing of intentional discrimination in racially based voting dilution claims founded on the fourteenth amendment. We conclude also that the case law requires the same showing in fifteenth amendment dilution claims. Moreover, we demonstrate that the dilution cases

of this circuit are consistent with our holding in this case. In particular, we read Zimmer as impliedly recognizing the essentiality of intent in dilution cases by establishing certain categories of circumstantial evidence of intentional discrimination.

Having set out the relevant legal principles, the focus of our discussion shifts in Part III to the specifics of this case. There we address and dismiss appellants' contention that the district court's factual determinations are clearly erroneous. Finally, in Part IV we reject appellants' argument that the court below misinterpreted the dilution precedents of this circuit. Consequently, we affirm the judgment of the district court.

I. Voting Dilution

In describing voting dilution claims, it is imperative at the outset, to distinguish the typical reapportionment case, which presents the traditional "one person, one vote" inquiry. See Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In such a case, there are a number of coordinate districts (e.g., state

legislative districts), and voters in larger districts allege that their votes are devalued in comparison to those of voters in smaller ones. The issue in a typical reapportionment case, therefore, is whether population deviations from the average district are impermissibly large. See, e.g., White v. Regester, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Gaffney v. Cummings, 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973); Mahan v. Howell, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973). The comparison is one based purely on population figures; no showing of discrimination along racial, ethnic, or political lines need be shown.

A case alleging violation of the one person, one vote standard, based solely on a mathematical analysis, may properly be called a "quantitative" reapportionment case. That an apportionment scheme satisfies the quantitative standard does not, however, insure equality in all the aspects of political representation. The heterogeneity of our society manifests itself in an unequal distribution of interest groups; racial and ethnic groups tend to be compartmentalized. Thus, even a districting plan drawn without regard to the distribution of

such groups may distort their relative voting strengths. And, of course, these underlying patterns present the opportunity for subtle discrimination by the manipulation of district lines. Such discrimination can occur even if perfect population equality exists. Cases alleging a distortion of group voting power of this type have been termed "qualitative" reapportionment cases because they focus "not on population-based apportionment but on the quality of representation." Whitcomb v. Chavis, 403 U.S. 124, 142, 91 S.Ct. 1858, 1868, 29 L.Ed.2d 363 (1971).

A familiar type of qualitative reapportionment case is one alleging gerrymander, the drawing of district lines to fence out, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), or slice up a compact interest group, e.g., Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, ___U.S.___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). Another, similar variety of qualitative reapportionment case is the dilution case, such as the one presented here. An at-large scheme operating to dilute the voting efficacy of an interest group

does so by exploiting the tendency of large districts to diminish what would be the natural effect of residency patterns if legitimate single-member districts were employed instead. If the single-member districts are small enough, a compact interest group will constitute a majority in some districts and will thus have the capacity to elect candidates sympathetic to its needs. The large districts characteristic of at-large plans tend to submerge compact groups in constituencies whose predominant segments may be unsympathetic to the group and its needs.

The Constitution, however, does not demand that each cognizable element of a constituency elect representaives in proportion to its voting strength. White v. Regester; Whitcomb v. Chavis; Kirksey v. Board of Supervisors; Zimmer v. McKeithen. Even consistent defeat of a group's candidates, standing alone, does not cross constitutional bounds. Whitcomb v. Chavis, 403 U.S. at 152-53, 91 S.Ct. 1858.

The issue in dilution cases, therefore, is not whether a given group elects a minimum number of candidates, and the standards are not different when, as here, the interest binding the group is one of race. "[I]t

is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential." White v. Regester, 412 U.S. at 765-66, 93 S.Ct. at 2339. Rather, in the absence of evidence that the at-large provisions themselves were "conceived or operated as purposeful devices to further racial. . .discrimination," Whitcomb v. Chavis, 403 U.S. at 149, 91 S.Ct. at 1872, the inquiry becomes one of determining whether the influence of a given racial group has been distorted because its members have been denied equal access to political processes such as party nominating procedures, registration, and, of course, voting. See id. at 149-50, 91 S.Ct. 1858. As explained in White v. Regester, the only Supreme Court case to date that has struck down an at-large scheme under a dilution rationale,

> [t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the

> political processes and to elect legislators of their choice.

White v. Regester, 412 U.S. at 766, 93 S.Ct. at 2339, (citing Whitcomb v. Chavis, 403 U.S. at 149-50, 91 S.Ct. 1858.)

In Zimmer v. McKeithen this circuit explicated the tests established in Chavis and Regester by enumerating certain factors the district courts should consider to determine whether a dilution case has been made out. These criteria were designed to guide the district court in the reception of evidence by establishing certain inquiries subsidiary to the ultimate issue of dilution. The district court is to make a particularized determination under each criterion and then weigh its findings to ascertain whether "in the aggregate" they point to dilution. Hendrix v. Joseph, 559 F.2d 1265 (5th Cir. 1977); David v. Garrison, 553 F.2d 923, 929 (5th Cir. 1977); Nevett v. Sides, 533 F.2d 1361, 1365 (5th Cir. 1976); Zimmer, 485 F.2d at 1305.

The court in Zimmer established two categories, one containing criteria going primarily to the issue of denial of access or dilution, the other containing inquiries as to the existence of certain structural voting devices that may enhance the under-

lying dilution. The "primary" factors include: the group's accessibility to political processes (such as the slating of candidates), the responsiveness of representatives to the "particularized interests" of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the group's participation in the election system. 485 F.2d at 1305. The "enhancing" factors include: the size of the district; the portion of the vote necessary for election (majority or plurality); where the positions are not contested for individually, the number of candidates for which an elector must vote[10]; and whether candidates must reside in subdistricts. Id.

10. A provision requiring that each elector cast votes for as many candidates as there are positions is known as an anti-single slot rule. An anti-single slot rule has application only in the context of an electoral scheme that selects winners by ranking all candidates in the order of the number of votes they receive. If there are x offices, the top x candidates fill them. This electoral scheme is denominated the "single-ballot-plurality" voting system. See R. Dixon, Democratic Representation: Reapportionment in Law and Politics 505 (1968); Silva, Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District, 17 W.Pol.Q. 742 (1964). An anti-single
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The following discussion demonstrates that a finding of racially discriminatory dilution under the Zimmer criteria raises an inference of intent and, therefore, that a finding under the criteria satisfies the intent requirement of Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Before this discourse is set out, we will examine the relevance of Davis to the voting dilution principle.

II. The Intent Requirement in Voting Dilution Cases

In this part we explain and justify our holding that to succeed in a dilution case such as the one before us, a plaintiff must show the at-large plan to be racially

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shot rule invalidates all ballots that do not show votes for as many candidates as there are positions. Minority voters can be disadvantaged by such a rule because it may force them to vote for non-minority candidates, thus depreciating the relative position of minority candidates.

The numbered position provision in force in Fairfield, also known as a "place" rule, requires candidates to choose one of a given number of positions and run for it. Thus, given x positions, it is as if there were x separate district-wide contests. The place system disadvantages minorities by causing minority candidates to run in head-to-head contests against majority candidates. See White v. Regester, 412 U.S. 755, 766, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973).

motivated. We begin with a discussion of the applicability of the intent principle to fourteenth amendment dilution claims. Next, the applicability of the principle to fifteenth amendment claims is discussed. Finally, we harmonize our holding with the case law of this circuit by demonstrating that Zimmer and its progeny establish sufficient conditions for a finding of intentional discrimination.

A. Intent in Fourteenth Amendment Dilution Claims

We start with a reiteration of the principle expounded by the Supreme Court in Davis. Where official action is racially neutral on its face, courts must adhere "to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S. at 240, 96 S.Ct. at 2048; accord, United States v. Texas Education Agency, 564 F.2d 162, 165-66 (5th Cir. 1977). The Court restated this teaching in Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977):

"Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." The language of Davis and Arlington Heights appears to establish intent as a prerequisite of universal applicability to fourteenth amendment claims of racial discrimination.[11] For appellants to succeed in their assertion that racially discriminatory intent need not be shown in dilution cases, we must find such cases exempt from the general principle enunciated in Davis and Arlington Heights. We do not so find.

It is readily apparent that voting dilution cases are quite typical of traditional fourteenth amendment cases. Here the appellants challenge legislation establishing at-large districting, a practice racially neutral on its face, as discriminatory in its effect: blacks do not

11. Since the four cases we decide today allege dilution of black votes, our holdings are necessarily limited to cases entertaining claims of racial discrimination.

elect their proportionate share of the city council. In Davis, the plaintiffs attacked a written personnel test, itself devoid of racial overtones, that had the effect of failing four times as many blacks as whites. And in Arlington Heights, blacks challenged a zoning ordinance prohibiting multi-family development, again a neutral provision, that resulted in the virtual exclusion of racial minority groups. The plaintiffs failed in both of these latter cases because they had not shown the official action to be racially motivated. Simply put, "[p]roof of a racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."

The language of the Court in Davis and Arlington Heights is unambiguous and admits of no exception. Analytically, nothing about at-large districting legislation suggests that it should be treated differently from any other manifestation of official action that may impact groups of people differentially. This observation is substantiated by the reliance of the Court in Davis and Arlington Heights upon Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), a case that

entertained an allegation that New York's congressional apportionment plan was a racial gerrymander.

In Davis and Arlington Heights, the Court buttressed its holdings by referring to Wright and other fourteenth amendment cases that held intentional discrimination necessary. The Davis opinion contains the following discussion:

> The rule is the same in other contexts. Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' 376 U.S. at 56, 58, 84 S.Ct. at 605, 11 L.Ed.2d at 515. The dissenters were in agreement that the issue was whether the 'boundaries. . .were purposefully drawn on racial lines.' 376 U.S. at 67, 84 S.Ct. at 611, 11 L.Ed.2d at 522.

426 U.S. at 240, 96 S.Ct. at 2047; accord, Arlington Heights, 429 U.S. at 265, 97 S.Ct. 555.

This very recent reaffirmation of the holding in Wright leaves no doubt that a showing of intent is a necessary element in a case alleging a racial gerrymander.[12] We see no distinction that would call for different constitutional requisites in a racial gerrymander case than in a voting dilution case such as this. The right allegedly infringed is the same in both contexts: the right to effective participation

12. That a districting scheme is motivated by racial considerations does not necessary render it subject to invalidation under the equal protection clause. A districting body may properly consider race if the plan does not "slur or stigma[tize]" any race and does not "fence out" a racial group from participation in political processes or "minimize or unfairly cancel out" such a group's voting strength. United Jewish Organizations v. Carey, 430 U.S. 144, 165, 97 S.Ct. 996, 1009, 51 L.Ed.2d 229 (1977). Although a benign plan, which is designed to remedy the underrepresentation of a racial minority group, is permissible under the Constitution, a state or locality is under no obligation to provide minorities, racial or otherwise, with representation proportionate to their voting power. E.g., White v. Regester, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973); Whitcomb v. Chavis, 403 U.S. 124, 152, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971).

in the electoral process. An unconstitutional gerrymander violates this right by compartmentalizing or fencing out a group, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), or by slicing up a compact minority, e.g., Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc), cert. denied, ___U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974). An invidious at-large scheme merely achieves the same end, denial of effective participation by submerging an interest group in a constituency large enough and polarized enough to place that group in the minority consistently.

That the constitutional tests should be the same whether the right to an equally effective vote is denied by drawing district lines or erasing them is illustrated in a number of our cases. We have repeatedly held the Zimmer criteria relevant to gerrymander as well as dilution cases. In Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974), a case finding a racially motivated gerrymander that fragmented "what could otherwise be a cohesive voting community," id. at 679, we stated:

> The standards for decision in dilution cases are developed primarily in cases dealing with [at-large] districting [citing, inter alia, White v. Regester, Whitcomb v. Chavis, and Zimmer v. McKeithen]. But "we have no hesitation in applying [those tests to] measure. . .the constitutionality of reapportionment plans involving only single-member districts. In each instance, we are required to determine the same question, whether or not there has been an unconstitutional manipulation of electoral district boundaries so as to minimize or dilute the voting strength of a minority class or interest."

Id. at 678 (quoting Howard v. Adams County Board of Supervisors, 453 F.2d 455, 458 n. 2 (5th Cir.), cert. denied, 407 U.S. 925 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972)) (emphasis added); accord, Kirksey v. Board of Supervisors, 554 F.2d at 143. Since we find no constitutionally significant distinction between this case and a gerrymander case light Wright v. Rockefeller, a decision expressly reaffirmed by the Supreme Court in Davis and Arlington Heights, we hold that a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim such as the one presented in this

case.[13]

B. Intent in Fifteenth Amendment Dilution Claims

The appellants allege that Fairfield's at-large plan is violative of the fifteenth amendment as well as the fourteenth. Thus, we must determine whether

13. Appellants point out, however, that neither Davis nor Arlington Heights contains any reference to voting dilution decisions such as Regester, Chavis and Zimmer. These dilution cases, appellants contend, have not required a showing of intentional racial discrimination, and hence the failure of Davis or Arlington Heights expressly to overrule these dilution precedents indicates they are an exception to the general rule.

Appellants' error is that they misconceive these dilution precedents. Regester and Zimmer do not hold that a showing of intent is unnecessary for a finding of unconstitutional dilution. Racially motivated discrimination was a significant factor in both Regester and Zimmer. In Regester, the Court found a "history of official racial discrimination. . ., which at times touched the right of Negroes to register and vote and to participate in the democratic process." 412 U.S. at 766, 93 S.Ct. at 2339; and in Zimmer, the Court noted that "minority residents. . . have suffered from a protracted history of racial discrimination which touched their ability to participate in the electoral process." 485 F.2d at 1306.

We recognize that neither Regester nor Zimmer dealt with the issue of racially motivated discrimination in the enactment of the at-large plans contested in those cases. The necessary intent, however, need not exist at the passage of the plan. All that

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illicit motivation is a prerequisite to a successful claim under the fifteenth amendment. We hold that it is.

The fifteenth amendment is a specific prohibition against state or federal action that denies or abridges "[t]he right of citizens of the United States to vote. . .on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, §1. Historically, this amendment was the vehicle of first resort for blacks alleging impairment of their franchise.[14] It protects

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is necessary is that the invidiously disproportionate impact "ultimately be traced to a racially discriminatory purpose." Davis, 426 U.S. at 240, 96 S.Ct. at 2048. Thus, as we recently held in Kirksey, a plan, pristine in its enactment, that carries forward past discrimination is violative of the fourteenth amendment. Similarly, a plan legitimate at its inception may become a vehicle for intentional discrimination and hence become unconstitutional when changing circumstances render it invidiously discriminatory. Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978).

14. The fifteenth amendment was ratified in 1870, but was not successfully invoked before the Supreme Court until 1915, when the Court nullified an Oklahoma provision exempting those who were qualified to vote prior to 1868 and their descendants from literacy and property requirements. Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915); accord, Myers v. Anderson, 238 U.S. 368, 35 S.Ct. 932, 59 L.Ed. 1349 (1915). Since blacks
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the rights of blacks to participate at all levels of the political process and interdicts all methods demonstrably contrived to

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were disenfranchized prior to the adoption of the amendment, this "grandfather clause" required blacks to pass literacy and property tests while exempting whites. When the Oklahoma legislature substituted a provision preserving the registrations of all those who had qualified under the invalidated provisions but requiring others to register within a given eleven-day period (or lose eligibility forever), the Supreme Court invalidated the substitute. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939). Subsequent decisions under the fifteenth amendment invalidated attempts to exclude blacks from party nominating processes, Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944), and invidiously to administer literacy tests, Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); Davis v. Schnell, 81 F.Supp. 872 (S.D.Ala.), aff'd, 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949).

Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960), is the first reapportionment case decided under the amendment. It, of course, held that a complaint alleging a racial gerrymander states a cause of action under the fifteenth amendment. See also Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964); Smith v. Paris, 257 F.Supp. 901 (M.D.Ala. 1966), aff'd per curiam, 386 F.2d 979 (5th Cir. 1967); Sims v. Baggett, 247 F.Supp. 96 (M.D.Ala. 1965). For a more detailed discussion of the history and development of the fifteenth amendment, see W. Gillette, The Right to Vote: Politics of the Passage of the Fifteenth Amendment (1965); J. Matthews, Legislative and Judicial History of the Fifteenth Amendment (1909);
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diminish this participation.[15] As the Supreme Court stated in the case of Lane v. Wilson, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281 (1939):

> The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race.

Broad though the reach of the amendment may be, it has been invoked successfully only in cases founded on acts of intentional racial discrimination. The necessary motivation was painfully apparent in the early cases striking down the exclusion of blacks from party primaries, e.g., Terry v. Adams, 345 U.S. 461, 463-65, 73 S.Ct. 809, 97 L.Ed. 1152 (1953); the grandfather clause, Guinn v. United States, 238 U.S. 347, 364-66, 35

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Lucas, Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot, 1961 Sup.Ct.Rev. 194.

15. See discussion, supra note 14.

S.Ct. 926, 59 L.Ed. 1340 (1915); and the invidious administration of literacy tests, e.g., Louisiana v. United States, 380 U.S. 145, 151-53, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965). Moreover, and of particular relevance to the inquiry before us, racially discriminatory motivations were unmistakably present in Gomillion, where the Court remarked that if the plaintiffs could prove their allegations,

> the conclusion would be irresistable, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

364 U.S. at 341, 81 S.Ct. at 127. These cases illustrate what is apparent on the face of the amendment: a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action.

Our holding is the converse of this proposition. A showing of improper motivation or purpose is necessary to establish a valid cause of action under the fifteenth amendment. Our conclusion is compelled by Wright, the Supreme Court decision we have

held controlling on the issue of intent in the fourteenth amendment claims in this case. Wright was brought under the fifteenth amendment as well. 376 U.S. at 56, 84 S.Ct. 603. That the Court held a showing of intentional discrimination was essential to a valid claim in that case implies as a matter of logic that such a demonstration is necessary under both fourteenth and fifteenth amendments.

Cases in this circuit exemplify the teaching of Wright. In Bradas v. Rapides Parish Police Jury, 508 F.2d 1109 (5th Cir. 1975), we vacated and remanded a judgment finding an at-large plan violative of the fifteenth amendment. Writing for the court, Judge Simpson stated:

> it does not suffice to show that the use of [at-large] districts has diminished to some extent the proportion of blacks in the voting unit unless some evidence also demonstrates that such [at-large] districts were "conceived or operated as purposeful devices to further racial or economic discrimination."

Id. at 1113 (quoting Whitcomb v. Chavis, 403 U.S. at 149, 91 S.Ct. 1858); see Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976).

We have held that the appellants cannot

succeed on either their fourteenth or fifteenth amendment claims unless they establish that Fairfield's at-large method of electing its city council exists because of invidious racial motivations. In the following section we demonstrate that the controlling dilution precedents of this circuit are consistent with this holding.

C. Fifth Circuit Dilution Precedents

The Alabama statute enabling Fairfield to establish its at-large electoral scheme was enacted in 1909. In 1901, however, Alabama had adopted a constitution which had effectively disenfranchised blacks. The appellees contend, therefore, that the 1909 statute could not have been adopted with a racial animus because no blacks who could have been discriminated against could vote. See McGill v. Gadsden County Commission, 535 F.2d 277, 279-80 (5th Cir. 1976); Taylor v. McKeithen, 499 F.2d 893 (5th Cir. 1974). Although we accept the district court's finding that the 1909 plan was adopted without discriminatory intent, cases of this circuit emphasize that the search for improper motivation does not end at the enacting stage. Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257

(5th Cir. 1978). A plan racially neutral at its adoption, may further preexisting intentional discrimination, e.g., Kirksey, or it may be maintained for invidious purposes, e.g., Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978).

Whether invidious discrimination motivates the adoption or maintenance of a districting scheme or whether the plan furthers preexisting purposeful discrimination, the intent requirement may be satisfied by direct or circumstantial evidence. Where direct evidence of discriminatory motive is proffered, a case is easily made, see, e.g., Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), as it is where the circumstantial evidence of racially discriminatory motivation is so strikingly obvious that no alternative explanation is plausible, e.g., Gomillion; Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). "But such cases are rare. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence." Arlington Heights, 429 U.S. at 266, 97 S.Ct. at 564 (footnotes omitted). An examination of the Zimmer

factors shows that they constitute "other evidence" which a court must consider in determining whether the districting scheme exists because of invidious racial considerations.

The Zimmer criteria go to the issue of intentional discrimination, first of all, because they would be irrelevant if motivation were not an issue. If, as the appellants suggest, it is sufficient that "the combination of a legal system (at-large election) with the minority status of blacks and a societal system (racially polarized voting) has the effect of diluting black voting strength" then of what relevance is the accessibility of political processes to blacks, the responsiveness of the city council to the needs of blacks, the weight of the state policy behond the at-large plan, or the existence of past discrimination in the electoral process? Moreover, the Supreme Court has squarely rejected the contention that at-large elections are unconstitutional merely because fewer minority candidates are elected, due to polarized voting, than would correspond to the minority's portion of the district population. Whitcomb v. Chavis, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). It is clear,

therefore, that mere disproportionate effects are not enough to invalidate an at-large plan and hence that the Zimmer criteria purport to establish something more.

Perhaps the most useful approach to analyzing the Zimmer criteria as they relate to the existence of intentional discrimination is to assume that an at-large scheme is being used as a vehicle for achieving the constitutionally prohibited end. The objective of such a scheme would be to prevent a group from effectively participating in elections so that the governing body need not respond to the group's needs. This objective would be achieved by insuring that a cohesive group remains a minority in the voting population, thus preventing that group from electing minority representatives or from holding non-minority representatives accountable.

Circumstantial evidence that the plan was enacted with discriminatory intent may exist in the form of starkly differential racial impact; the historical background of the plan, "particularly if it reveals a series of official actions taken for invidious purposes"; or the "specific sequence of events leading up to the challenged decision." Arlington Heights, 429 U.S. at 267, 97 S.Ct. at 564; see Smith v.

Paris, 257 F.Supp. 901 (M.D.Ala. 1966), aff'd per curiam, 386 F.2d 979 (5th Cir. 1967); Sims v. Baggett, 247 F.Supp. 96 (M.D.Ala. 1965). Such was the approach of the inquiries in Davis and Arlington Heights, cases we noted recently in Kirksey v. Board of Supervisors to be "of particular significance. . .if the only issue were whether the racially neutral plan created such exclusion [from the electoral process]." 554 F.2d at 147 (emphasis in original). But, as we held in Kirksey, the inquiry does not stop at the enacting stage.

Where evidence of discriminatory intent is lacking in the enacting processes, the Zimmer criteria become acutely relevant. They may demonstrate, as in Kirksey, that the neutral plan is an "instrumentality for carrying forward patterns of purposeful and intentional discrimination." 554 F.2d at 147. In Kirksey, the plan was recently formulated, and it perpetuated past intentional discrimination. A remotely enacted plan, such as the 1909 plan in this case, that was adopted without racial motivations may become a vehicle for the exclusion of meaningful minority input because intervening circumstances cause the plan to work that way. When the more blatant

obstacles to black access are struck down, such an at-large plan may operate to devalue black participation so as to allow representatives to ignore black needs. Where the plan is maintained with the purpose of excluding minority input, the necessary intent is established, and the plan is unconstitutional. We so hold today in Bolden v. City of Mobile.

Whether the plan is recent or remote, the Zimmer criteria provide a factual basis from which the necessary intent may be inferred. Consider a plan neutral in its enactment that is used as a vehicle for intentionally ignoring black interests. The existence of such discrimination presupposes racially polarized voting in the electorate.[16] Polarized or bloc voting, although

16. If racially polarized voting did not exist, white candidates could not expect to retain or achieve office solely because they are white. Their black constituents would constitute merely another minority group that might become an element necessary to the formation of a majority coalition. Under these conditions, white officeholders would ignore black needs at their peril.

Additionally, in the absence of polarized voting, black candidates could not be denied office because they were black, and a case of unconstitutional dilution could not be made. "[I]f voting does not follow racial lines, the [voter of the minority race] has little reason to complain. . . ."
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in itself constitutionally unobjectionable,[17] allows representatives to ignore minority interests without fear of reprisal at the polls. When bloc voting has been demonstrated,[18] a showing under Zimmer that

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United Jewish Organizations v. Carey, 430 U.S. 144, 166 n. 24, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977).

17. As the Supreme Court has recently noted, "there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process." United Jewish Organizations v. Carey, 430 U.S. 144, 167, 97 S.Ct. 996, 1010, 51 L.Ed.2d 229 (1977); accord, Nevett v. Sides, 533 F.2d 1361, 1365 (5th Cir. 1976).

18. Bloc voting may be indicated by a showing under Zimmer of the "existence of past discrimination in general. . ., large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." 485 F.2d at 1305. Of course, bloc voting may be demonstrated by more direct means as well, such as statistical analyses, e.g., Bolden v. City of Mobile, 423 F.Supp. 384, 388-89 (S.D.Ala. 1976), aff'd, 571 F.2d 238 (5th Cir. 1978), or the consistent lack of success of qualified black candidates.

the governing body is unresponsive to minority needs is strongly corroborative of an intentional exploitation of the electorate's bias. The likelihood of intentional exploitation is "enhanced" by the existence of systematic devices such as a majority vote requirement, an anti-single shot provision, and the lack of a requirement that representatives reside in subdistricts. Zimmer, 485 F.2d at 1305. As the Supreme Court observed, "[t]hese characteristics of [an] electoral system, neither in themselves improper nor invidious, [enhance] the opportunity for racial discrimination. . . ." White v. Regester, 412 U.S. at 766, 93 S.Ct. 2340.

The establishment under Zimmer that blacks have been denied access to slating, registration, or other aspects of political participation may indicate that if white representatives have not properly entertained black interests, it is because blacks cannot achieve the input to which they are entitled. See Wallace v. House, 515 F.2d 619, 622-23 (5th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976). Under the proper circumstances, such a showing would satisfy

the intent requirement.[19]

A tenuous state policy in favor of at-large districting may constitute evidence that other, improper motivations lay behind the enactment or maintenance of the plan. The absence of a significent and legitimate state policy behind districting provisions

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19. Showings of unresponsiveness and lack of access make a strong dilution case. The capacity of a governing body to respond to the needs of its constituency is, in large measure, what makes that body representative. See H. Pitkin, The Concept of Representation 233 (1972). Ideally, electoral processes are designed to provide an institutional and periodic method of guaranteeing governmental responsiveness. "Our concern with elections and electoral machinery, and particularly with whether elections are free and genuine, results from our conviction that such machinery is necessary to insure systematic responsiveness." Id. at 234.

Thus, if representatives are unresponsive to the needs of a racial group apparently because some stages of the electoral process diminish the group's input, the inference that the processes are maintained with the purpose to discriminate can fairly be drawn. "[At-large] districts, it would seem, violate the Equal Protection Clause, not because they overrepresent or underrepresent pure and simple, but because they do that in a context where all stages of the electoral processes have been effectively closed to identifiable classes of citizens, making the political establishment 'insufficiently responsive' to [those classes'] interests." Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup.Ct.Rev. 1, 28. See also Hendrix v. Joseph, 559 F.2d 1265, 1269 (5th Cir. 1977).

has been an important factor in several cases finding intentional discrimination. In Gomillion, the defendant city officials had "never suggested, either in their brief or in oral argument, any countervailing municipal function which [the districting act] is designed to serve." 364 U.S. at 342, 81 S.Ct. at 127. And in Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340 (1915), which struck down Oklahoma's grandfather clause, the Court stated: "we are unable to discover how, unless the prohibitions of the 15th Amendment were considered, the slightest reason was afforded for basing the classification upon a period of time prior to the 15th Amendment." Id. at 366, 35 S.Ct. at 931. Although state statutes generally need satisfy only minimum rationality requirements, see, e.g., Hennessey v. National Collegiate Athletic Association, 564 F.2f 1136, 1144 (5th Cir. 1977), the weight of the state policy behind the districting plan is an evidentiary consideration that must be considered along with all other relevant evidence to determine whether the plan is improperly motivated.[20]

20. Professor Brest summarizes the relevance of the weight of the state policy as follows:
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That the finder of fact determines the plaintiff has prevailed under one or even several of the Zimmer criteria may not establish the existence of intentional discrimination. See, e.g., McGill v. Gadsden County Commission, 535 F.2d 277 (5th Cir. 1976). The evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. Of course, the plaintiff need not prevail under all of the criteria, Zimmer, 485 F.2d at 1305, nor is he limited to them.[21] The task before the fact finder is

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> The courts possess no general authority to invalidate a decision because it is "undesirable," and an allegation of illicit motivation does not enlarge their authority. A conscientious decisionmaker, however, considers the costs of a proposal, its conduciveness to the ends sought to be attained, and the availability of alternatives less costly to the community as a whole or to a particular segment of the community. That a decision obviously fails to reflect these considerations with respect to any legitimate objective supports the inference that it was improperly motivated.

Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup.Ct. Rev. 95, 121-22.

21. As we said recently in Kirksey v. Bd. of
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to determine, under all the relevant facts, in whose favor the "aggregate" of the evidence preponderates.[22] This determination is peculiarly dependant upon the facts of each case. It comprehends "a blend of history and an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise." White v. Regester, 412 U.S. at 769-70, 93 S.Ct. at 2341. It is the obligation, therefore, of the finder of fact carefully to examine and weigh the competing factors to determine whether the coincidence of those probative of intentional discrimination is sufficient. "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive

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Supervisors, 554 F.2d 139 (5th Cir.)(en banc), cert. denied, __U.S.__, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977), "[b]y proof of an aggregation of at least some of [the] Zimmer] factors, or similar ones, a plaintiff can demonstrate that the members of the particular group in question are being denied access." Id. at 143 (emphasis added).

22. This procedure is not different from that employed by a fact finder in resolving any issue by circumstantial evidence. As in other circumstantial evidence cases, it may be that the findings in the plaintiffs favor, taken individually, cannot establish the ultimate issue. This does not necessarily foreclose relief. The aggregate of the evidence controls.
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inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights, 429 U.S. at 266, 97 S.Ct. at 564.

We take this opportunity to address language in several opinions of this circuit that has caused some apparent confusion in this changing and complex area of the law. It appears that a number of our cases have espoused alternative approaches available to plaintiffs in dilution cases. The earliest case setting forth these alternatives is Howard v. Board of Supervisors, 453 F.2d 455 (5th Cir.), cert. denied, 407 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972).

> As we view the constitutional requirements in this area, to establish the existence of a constitutionally impermissible redistricting plan, in the absence of malapportionment, plaintiffs must maintain the burden of proving (1) a racially motivated gerrymander, or a plan drawn along racial lines, Wright v. Rockefeller, 1964, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512; Gomillion v. Lightfoot, 1960, 364 U.S. 339, 81 S.Ct.

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"[T]he convergence of a number of decisions, each of which could be explained in terms of licit objectives. . .may support the conclusion that each of the decisions is illicitly motivated." Brest, supra note at 123 n. 139.

125, 5 L.Ed.2d 110; Sims v. Baggett, M.D.Ala. 1965, 247 F.Supp. 96, or (2) that ". . . designedly or otherwise, a[n]. . . apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Burns v. Richardson, 1966, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294, 16 L.Ed.2d 376. See Whitcomb v. Chavis, 1971, 403 U.S. 124, 143-144, 149, 91 S.Ct. 1858, 29 L.Ed.2d 363.

Id. at 457-58 (emphasis in original)(footnote omitted). Subsequent decisions have reiterated these standards. Panior v. Iberville Parish School Board, 536 F.2d 101, 104-05 (5th Cir. 1976); Ferguson v. Winn Parish Police Jury, 528 F.2d 592, 596-97 (5th Cir. 1976); Wallace v. House, 515 F.2d 619, 622-23 (5th Cir. 1975), vacated and remanded on other grounds, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976); Bradas v. Rapides Parish Police Jury, 508 F.2d 1109, 1113 (5th Cir. 1975); Robinson v. Commissioners Court, 505 F.2d 674, 678 n. 3 (5th Cir. 1974); Moore v. Leflore County Board of Election Commissioners, 502 F.2d 621, 623-24 (5th Cir. 1974); Zimmer, 485 F.2d at 1304.

The first approach open to plaintiffs is one we have already discussed. Blacks challenging a districting system may succeed under a Gomillion-type rationale by establishing that the plan was enacted with discriminatory purpose. The second avenue, however, seems to allow plaintiffs to succeed under a dilution rationale without establishing intentional discrimination. To the extent that these cases suggest that intent is not required, they cannot be reconciled with the intervening Supreme Court decisions in Davis and Arlington Heights.

In each of these Fifth Circuit cases, however, such language was not operative. In Robinson v. Commissioners Court, the plan was struck down under the first alternative: intentional discrimination was found. "The district court determined . . . that the County Commissioners' apportionment was designed precisely to dilute the black vote and. . .we find no reason on this record to reject that conclusion as clearly erroneous." 505 F.2d at 679 (emphasis added). Those cases finding dilution under the second alternative did so on the basis of Zimmer. Wallace v. House, 515 F.2d at

623-24; Moore v. Leflore County Board of Election Commissioners, 502 F.2d at 624-25; cf. Ferguson v. Winn Parish Police Jury, 528 F.2d at 598-99. We hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination, and, therefore, the essential element of intent was present in each of these cases. Finally, cases finding no dilution, like Howard v. Board of Supervisors, Panior v. Iberville Parish School Board, and Bradas v. Rapides Parish Police Jury, cannot establish the proposition that intent is unnecessary to make out a dilution case.

Having determined that plaintiffs must make a showing of intentional discrimination to prevail in a dilution case, and having set forth the means of establishing the requisite showing, we now turn to the specifics of this case to measure it against the standards we have enunciated.

III. The District Court's Findings of Fact

We now address the second issue raised on appeal: whether the district court's findings of fact with respect to the Zimmer criteria are erroneous. We must preface our inquiry with the principle that the

district court's determinations under the Zimmer criteria will stand, if supported by sufficient evidence, unless clearly erroneous. Fed.R.Civ.P. 52(a); Hendrix v. Joseph, 559 F.2d 1265, 1268 (5th Cir. 1977); Gilbert v. Sterrett, 509 F.2d 1389, 1393 (5th Cir. 1975); see McGill v. Gadsden County Commission, 535 F.2d 277, 280 (5th Cir. 1976). Additionally, the panel hearing this case on the first appeal had occasion to examine the district court's findings of fact, which have not been augmented by any new evidence on remand, and it determined that "[n]one of the findings of fact, considered separately from the intermingled conclusions of law, can be set aside as clearly errneous." 533 F.2d at 1364. We accept this court's prior appraisal as law of the case with respect to the factual matters determined by the district court in its original, February 20, 1975, opinion. See Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316, at 1319-1321 (5th Cir. 1978); Lincoln National Life Insurance Co. v. Roosth, 306 F.2d 110 (5th Cir. 1962), cert. denied, 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed.2d 720 (1963).

The only question remaining, then, is whether the latest, June 11, 1976, findings

of the district court are consistent with its prior findings. We proceed by examining the district court's determinations under each of the Zimmer criteria that appellants challenge on this appeal. First, however, we think it profitable to take this opportunity briefly to discuss what Zimmer requires of a trial court in a dilution case. The ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group. Zimmer establishes certain subissues, the criteria, that a trial court must address before it can reach the ultimate issue of dilution. In essence, the criteria are directions that tell the trial court what type of circumstantial evidence can make out a dilution case. The court must address each subissue, if relevant to the particular case at hand,[23] and

23. As we note in Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 255 n. 6 (5th Cir. 1978), dependent upon the nature of the scheme under attack, not all of the criteria may be relevant, and additional factors may have probative force. Notwithstanding, the multifactor test established in Zimmer is the touchstone in dilution cases, and the trial judge must look to it for guidance in determining what subissues may be appropriate.

determine whether the evidence under that criterion weighs in favor of or against a finding of dilution. The court is next to view the findings under the criteria as a whole, i.e., "in the aggregate," Zimmer, 485 F.2d at 1305, giving due regard to the significance and strength of the finding under each subissue, to determine if the ultimate inference of dilution is permissible, and, if so, whether the evidence preponderates in its favor. See Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d at 251.

"The process does not differ from that of inferring ultimate facts from basic facts in other areas of the law. It is grounded in an experimental, intuitive assessment of the likelihood that the decision was designed to further one or another objective." Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup.Ct.Rev. 95, 121. We think that the district court in this case properly followed the mandate of Zimmer and correctly applied its test, and we turn to the findings of the district court that appellants question here.

The district court held on remand that there had been no showing of lack of black

access to the electoral processes in Fairfield. The court's earlier opinion noted that in 1968 six blacks won election to the council[24] but that in 1972 blacks failed to win any of the eight seats they contested. The court attributed the marked disparity in these results not to any invidious racial discrimination but rather to the failure of blacks to turn out a higher percentage in 1972.[25] The testimony of one of the witnesses was cited as "quite candid. . .in saying that there was no diffilculty in qualifying to run for the city council." The witness went on to characterize the task facing a candidate as "essentially. . .a matter of getting out the vote, of getting more votes than the opponent or opponents did."

Given these findings, which our prior panel found to be valid, we cannot rule the district court's conclusion of accessibility

24. Seven black candidates qualified to run for city council in 1968. All but the candidate for council president prevailed.

25. As the district court stated in its opinion on remand, "[t]he failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places."

clearly erroneous. The success or failure of black candidates appears to depend not upon any barriers to access to the slating or registration stages of Fairfield's political processes but upon racially polarized voting in an at-large setting and the shifting racial makeup of the voting population.

The district court's opinion on remand states that the appellants have not demonstrated unresponsiveness by city officials to the needs of black residents. The original opinion contains findings that "blacks have gotten far more responsiveness from city council when there were blacks on the city council." The court also noted, however, "that blacks have not had the door completely closed in their faces insofar as expressing their opinions at city council meetings, in seeking assistance, presenting petitions, being heard, and on some occasions being given what amounts to private audiences for the presentation of these matters." And finally, "the court has sensed that some of these requests have gotten answers, not to the same degree that the witnesses or that the black communities as a whole wanted, but there has not been a total lack of responsiveness merely be-

cause there were no blacks on the city council." The panel on first appeal found the district court's determination not to be clearly erroneous, and the finding on remand of sufficient responsiveness on the part of the city council is consistent with that determination. Therefore, the finding must stand.

The final factual determination challenged by appellants is the district court's conclusion that "plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system." The parties did not introduce evidence concerning the existence of racial motivation in the passage of the original, 1909 version of the districting legislation. Furthermore, as noted, the appellants failed to supply the court with any substantial evidence of past discrimination relating to Fairfield's electoral system. Since the appellants clearly had the burden of coming forward with evidence of past racial discrimination that precludes the effective participation of blacks in the electoral process today,[26]

26. We are fully aware of the recent holding in Kirksey v. Bd. of Supervisors, 554 F.2d 139 (5th Cir. 1977) (en banc), cert. denied, ___ U.S. ___, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977), that required the
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McGill v. Gadsden County Commission, 535 F.2d 277, 280 (5th Cir. 1976), the district court's conclusion in its more recent opinion that such preclusion has not been shown to exist must stand as well.

We note that not all the district court's findings under Zimmer have been challenged in this appeal. The appellees do not challenge the finding that the state policy behind at-large districting is tenuous, nor do they dispute the district court's findings under the enhancing factors: that the district is large; that a majority vote requirement exists, but that since only two candidates run for virtually all positions, the requirement is "for all practical purposes no different from a plurality vote requirement"; and that the Fairfield plan requires candidates to run for numbered positions. Nor do the appellants challenge the finding that there is a residency requirement in Fairfield's plan. Since these

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defendants in that case to bear the burden of coming "forward with evidence that enough of the incidents of the past had been removed, and the effects of past denial of access dissipated, that there was presently equality of access." Id. at 144-45. The reasoning leading to the placement of this burden on defendants is not apposite in this case. The en banc court emphasized that the plaintiffs had
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findings have not been disputed, they are not open to question on appeal.

We find the district court's factual determinations under Zimmer not clearly erroneous; therefore, the only primary factor that we take to be established in the appellants' favor is the existence of a tenuous state policy behind at-large districting. The district court found this showing, "[e]ven when 'enhanced' by two or possibly three of the 'extra' factors," to be "insufficient 'in the aggregate' to establish a case of 'dilution.'" Consequently, our only remaining task is to determine whether this conclusion is correct as a matter of law.

IV. The District Court's Interpretation of Zimmer and Subsequent Dilution Precedents

The final issue we must address is whether the district court's conclusion that dilution had not been demonstrated represents a proper interpretation of Zimmer and other applicable case law. We note initially that the district court properly followed the

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demonstrated "sweeping and pervasive" past intentional discrimination. Id. at 144. Furthermore, the intentional discrimination was shown to have continued to within a few years of the present. In this case, however, the appellants have not demonstrated pervasive discrimination in Fairfield's electoral processes in the past, remote or recent.

instructions in our prior opinion in this case to base its conclusions "on the criteria that. . .Zimmer. . .distilled from White v. Regester. . .and in accordance with all later cases." 533 F.2d at 1365. The district court has made specific findings with regard to each of the dilution criteria.

We find also that the court properly approached the task of weighing the Zimmer factors. As we have stated, the task before the district court is to determine whether the criteria in the aggregate indicate a racially motivated dilution. The district court correctly performed its task when it proceeded from the understanding that "'dilution' is to be defined as the 'aggregate' of the factors outlined in Zimmer, bearing in mind that 'all of these factors need not be proved in order to obtain relief.'" Furthermore, after concluding that of the primary factors, the appellants had established only the existence of a tenuous state policy, the court held this showing to be "insufficient 'in the aggregate' under [the Zimmer] criteria to establish a case of dilution.'"

We find the district court's conclusion wholly correct. We cannot say that a finding of a tenuous state policy behind at-

large districting, standing alone, makes out a case under Zimmer or any other controlling precedent. In the absence of other evidence indicating the existence of intentional discrimination, state enactments providing for at-large districting are entitled to the deference afforded any other statute: their means need only be reasonably related to ends properly within state cognizance. E.g., Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 97 S.Ct. 1898, 1910, 52 L.Ed.2d 513 (1977); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 55 L.Ed. 369 (1911). That these minimal constraints are satisfied by state statutes providing for government by representatives elected at-large is beyond dispute. The Supreme Court and this circuit have repeatedly rejected contentions that at-large districting is per se unconstitutional. E.g., White v. Regester, 412 U.S. at 765, 93 S.Ct. 2332; Whitcomb v. Chavis, 403 U.S. at 142, 91 S.Ct. 1858; Lipscomb v. Wise, 551 F.2d 1043, 1046 (5th Cir. 1977), cert. granted, ___ U.S. ____, 98 S.Ct. 716, 54 L.Ed.2d 750 (1978); Turner v. McKeithen, 490 F.2d 191,

196 n. 23 (5th Cir. 1973); Zimmer, 485 F.2d at 1304.

The question whether the enhancing factors found to exist are sufficient in this case, when aggregated with the existence of a tenuous state policy, is a factual issue that must be resolved by the district court. Given the inability of the appellants to establish any additional criteria that would lend support to an inference of racially motivated dilution, the trial court's determination must stand.

The appellants did not demonstrate a lack of access to the political processes in Fairfield. They did not establish that the commission was unresponsive to the needs of the black community, and although this failure does not preclude a finding of dilution, McGill v. Gadsden County Commission, 535 F.2d 277, 280 n. 7 (5th Cir. 1976); Zimmer, 485 F.2d at 1306-07 n. 6, it weighs heavily against an inference of intentional discrimination because the incumbents are not visibly exploiting their majority status to the detriment of the minority constituents. No residual effects of past discrimination were found to preclude the effective political participation of blacks in Fairfield. Indeed, six blacks

were elected to the city council in 1968, and the district court found the failure of black candidates in 1972 to be due not to invidious racial discrimination but to a failure to turn out more of the black vote.

Under these particular circumstances, the district court's conclusion that "there has been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose" (citing Davis) is wholly warranted. The failure to establish the existence of intentional discrimination follows naturally from the factual determinations under Zimmer in this case.

This case, then, falls squarely within the principle established in Wright and reaffirmed in Davis and Arlington Heights. In the aggregate, the Zimmer criteria do not point to a racially motivated dilution. Absent a showing that intentional discrimination was a motivating factor in either the enactment or maintenance of the plan, these appellants cannot succeed.

The district court's judgment is therefore

AFFIRMED.

APPENDIX

The Opinion of the District Court

MEMORANDUM OF OPINION*

This court, under the mandate received June 10, 1976, is to reconsider its earlier decision in the light of the principles stated in the opinion of the Court of Appeals. Due to imminent deadlines for compliance with election law procedures, oral argument was, with consent of the parties, immediately scheduled. This memorandum supplements (and, to the extent inconsistent, supersedes) the earlier findings and conclusions of the court, which will not be repeated.

The first task is to make specific findings with respect to the four principal factors outlined in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (CA5 1973), as the criteria for determining "dilution."

(1) The plaintiffs, blacks residing in the City of Fairfield, have not demonstrated any lack of access to the process of slating candidates for city elections; for in Fairfield there has been no such slating. Perhaps more to the point, the evidence has not shown that blacks in recent years have been denied access to participation in any parts or phases of the election

*Nevett v. Sides, N.D.Ala., No. 73-P-529.

processes in Fairfield, e.g., qualifying as candidates, campaigning, voting.

(2) It has not been demonstrated that there has been "unresponsiveness" by city officials to the "particularized needs" of blacks. This is not, of course, merely a question of whether the city officials have listened to, and given some answer to, the special requests of black citizens of the city. Nor is it a question of whether those officials have always complied with those requests. Rather, the standard involves an inquiry into whether those officials have reacted to those needs with sympathy and concern--such as would be expected of persons holding a public trust for all the citizenry of a community, who are ultimately accountable to all the voters at the next election. While the evidence has shown that blacks have fared less well during an all-white city administration than during a racially-mixed administration or than under the laws of chance, it has not established "unresponsiveness" under this standard. In this respect, it should be noted that the inquiry is directed to "unresponsiveness", referring to a state, condition or quality of being unresponsive, and is not established by isolated acts of being unresponsive.

(3) Under state law, cities of the size of Fairfield are permitted to divide

the city into wards and to decide upon the number of such wards. If more than seven wards are created, then each ward, by vote of the ward, will elect a single member to the city council (with the president of the council, and perhaps other members being elected from the city at-large). If less than eight wards are created, then all members of the council will be elected by at-large vote, with two members being resident of each ward. In view of this optional dichotomy, it cannot be said that there is a state policy favoring at-large or multi-member districts for city council in preference to single-member ward-elected districts. (Proof that there is no such state policy should suffice to establish that any such state policy is "tenuous".)

(4) The plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system. The discrimination made known to the court pre-dated the elections in 1968, in which six of the 13 persons elected to the council were black. The failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a

higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places.

Next, the court is to make specific findings on the "enhancing factors" outlined in Zimmer v. Keithen, supra, 485 F.2d at 1305.

(1) Since the past elections have been from the city at large, the election district must be considered "large", at least in a relative sense. The district is as large as it can be.

(2) There is a majority vote requirement. Where, however, as in the 1972 election, there are but two people running for virtually all positions, a majority vote requirement is for practical purposes no different from a plurality vote requirement.

(3) There is no anti-single slot voting provision since candidates run for numbered positions. The numbered position approach does have some of the same consequences however as an anti-single shot, multi-member race; because a cohesive minority is unable to concentrate its votes on a single candidate. The numbered position approach does, however, eliminate the problem caused when a minority group is unable

to field enough candidates in anti-single shot, multi-member races.

(4) There is a provision, a requirement, that the at-large candidates for the city council (excepting the position of President) be residents of particular geographical subdistricts.

When this court entered its earlier decision, it did so in the belief that "dilution" was established upon proof that (a) in a city where blacks constituted a majority of the voters in some of the districts but slightly less than 50% of the voters for the city as a whole, (b) where voting rather strictly followed racial lines, (c) a "winner-take-all" election system by at-large voting for numbered places resulted in practice (d) in an all-white governing body, (e) whose decisions, though without indication of fraud or bad faith, quite understandably tended to reflect their own perspectives and the attitudes of those who elected them, to the relative detriment of the black minority, (f) including such matters as appointments to other boards and agencies of the city. The court was of the view that such evidence demonstrated that the black plaintiffs "had less opportunity than did other residents

in the district to participate in the political processes and to elect legislators of their choice." White v. Regester, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). The court thought that the factors outlined in Zimmer were to be taken as indicia of--but not necessarily the determinants of--"dilution."

The court now understands that its approach was in error and that "dilution" is to be defined as the "aggregate" of the factors outlined in Zimmer, bearing in mind that "all of these factors need not be proved in order to obtain relief." 485 F.2d at 1305. It appears that only one of the four primary factors--number (3)--has been established by plaintiffs. Factors (1) and (4) have clearly not been proved. The evidence respecting factor (2) is mixed, but, using what the court believes to be the appropriate meaning of "unresponsiveness", this factor has likewise not been proved to the court's reasonable satisfaction.

Even when "enhanced" by two or possibly three of the "extra" factors, proof of factor (3) is insufficient "in the aggregate" under these criteria to establish a case of "dilution." Accordingly, the court finds and concludes that there has not been

proved an impermissible dilution of black votes under the existing Fairfield system. It may be noted that there has been no evidence that the claimed "dilution" was the result of any invidious discriminatory purpose. Cf. Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

Judgment in favor of the defendants will be entered by separate order.

This the 11th day of June, 1976.

/s/Sam C. Pointer, Jr.

United States District Judge

WISDOM, Circuit Judge, specially concurring.

I concur in the results the majority reached in three of the voting dilution cases decided today: Nevett v. Sides, 571 F.2d 209; Thomasville Branch of the NAACP v. Thomas County, 571 F.2d 257; Bolden v. City of Mobile, 571 F.2d 238. I cannot find as much between the lines of the Zimmer opinion as the majority finds, but in view of Washington v. Davis and Arlington Heights I understand why the majority should seek and find discriminatory intent. The majority holds that these two important cases require proof of a racially

discriminatory intent in voting dilution cases. The intent is established by a showing that there exists an "aggregate" of the factors outlined in Zimmer. The fact-finder determines "under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates." (The majority's focus, notwithstanding its emphasis on intent as an essential element in a holding of dilution, is on the effects of at-large voting or multi-member districting on the accessibility of a minority group to the political process.) Then, if invidious effects preponderate, the court by inference declares that the legislative body which initiated the plan had a racially discriminatory intent. If for historical or other reasons the voting scheme could not initially have motivated by a racially discriminatory intent, as in Shreveport, then failure of the legislative body to take affirmative curative action demonstrates, under Kirksey, an illegal intent to maintain diluted voting rights.

I find it more straightforward, and not inconsistent with Washington v. Davis and Arlington Heights, to hold that the fourteenth amendment, through the equal protection clause, and the fifteenth amend-

ment, in itself and through congressional statutes enacted to make the amendment effective, prohibit dilution of voting rights--without proof of racial discriminatory purpose. I agree, therefore, with the position of the United States, as expressed in the amicus brief of the Attorney General. And in the field of civil rights I recognize and would give weight to the expertise of the Department of Justice.

I.

In Fortson v. Dorsey, 1965, 379 U.S. 433, 439, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, the Supreme Court said:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. . .This question, however, is not presented by the record before us." (Emphasis added).

The Supreme Court reaffirmed this language in Burns v. Richardson, 1966, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376: "Where the requirements of Reynolds v. Sims are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that

'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'. . . ." (Emphasis added). 384 U.S. at page 88, 86 S.Ct. at page 1294. The Court twice repeated the substance of this statement. At page 88, 86 S.Ct. at page 1295, the Court said: "Speculations do not supply evidence that the multi-member districting was designed to have or had the invidious effect necessary to a judgment of the unconstitutionality of the districting. . . ." (Emphasis added). And on page 89, 86 S.Ct. on page 1295, the Court said: "[Legislative judgments on apportionment are] subject to constitutional challenge only upon a demonstration that the interim apportionment, although made on a proper population basis, was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." (Emphasis added).

This Court has construed the Supreme Court's use of the term "or otherwise" to mean that intent to discriminate need not be proved when a voting plan minimizes or cancels out minority voting strength. Panior

v. Iberville Parish School Bd., 5 Cir. 1976, 536 F.2d 101, 104-105; Ferguson v. Winn Parish Police Jury, 5 Cir. 1976, 528 F.2d 592, 597; Wallace v. House, 5 Cir. 1976, 515 F.2d 622-623; Bradas v. Rapides Parish Police Jury, 5 Cir. 1975, 508 F.2d 1109, 1113; Robinson v. Commissioners Court, Anderson County, 5 Cir. 1974, 505 F.2d 674, 678 n. 3; Moore v. Leflore County Board of Election Commissioners, 5 Cir. 1974, 502 F.2d 623-624; Zimmer v. McKeithen, 5 Cir. 1973, 485 F.2d at 1304; Howard v. Adams County Board of Supervisors, 5 Cir. 1972, 453 F.2d 455, 457-458, cert. denied, 405 U.S. 925, 92 S.Ct. 2461, 32 L.Ed.2d 812 (1972).

In White v. Regester, and Whitcomb v. Chavis, the leading cases involving multi-member districts, the Supreme Court did not require proof of a legislative intent to discriminate. White v. Regester did not suggest that the reapportionment was enacted with improper racial motive and intent; instead the Court discussed the effect of the reapportionment plan upon minorities in Bexar and Dallas Counties. The plaintiffs' burden was to show that they "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice". White

v. Regester, 412 U.S. at 766, 93 S.Ct. at 2339.

Washington v. Davis and Arlington Heights were not voting dilution cases. Washington v. Davis sustained the use of a pre-employment test which had a disproportionate impact on black applicants; this seems to have been the sole effect on which the plaintiffs relied. In Arlington Heights the Court held that the plaintiffs had failed to prove discrimination when a village refused to re-zone property for the construction of racially integrated low income housing; as I see it, the Court could reasonably have gone either way in that case. The reach of these cases extends beyond their contexts, but I find it significant that the opinions do not mention White v. Regester; Whitcomb v. Chavis, or any other case involving dilution of the black vote by at-large voting or multi-member districts. The Court did cite Wright v. Rockefeller, but in that case the plaintiffs failed to prove vote dilution; even if the district lines followed racially identifiable neighborhood lines (which the court doubted), they were drawn with either a neutral or benign purpose. As this Court stated in Kirksey, 554 F.2d at 149: "White v. Regester is alive and well";

Washington v. Davis and Arlington Heights do not "suggest that White v. Regester and its progeny are no longer law".

My disagreement with the majority is not in our different verbalizing of similar views. I agree that it is reasonable to argue, for example, that proof of the invidious effects of multi-member districts or at-large voting raises an inference, perhaps, in some cases, a strong presumption, of discriminatory purpose. That formulation is run-of-the mine, acceptable, legal semantics--in some cases. It will not cover those cases in which the voting scheme was neutral when initiated or even benign but had unintended or inadequately considered invidious effects on the voting rights of minorities. In those cases, as the majority was driven to say, the discriminatory purpose is found in maintaining the voting plan, that is, taking no affirmative curative action. This view of inaction is inconsistent with Washington v. Davis.

In some cases legislative intent may be unprovable; resort must be had to inference. When, however, a court must consider a laundry list, an "aggregate" of factors, some pointing one way and others pointing another way, the case turns on the attitude

of the trial judge and the appellate judges toward the American brand of federalism; I question whether "Our Federalism" is James Madison's federalism. Is federal interference with the voting scheme of a State or local government an unwarranted intrusion or is it valid protection of federal rights under the thirteenth, fourteenth, and fifteenth amendments? The answer may depend more on the legal philosophy of the particular judge or judges in the case than on the logical relationship between effects, as evidentiary facts, and the inference that the state or local governing body necessarily intended to deny or to dilute the votes of black citizens. The judicial branch defers to the coordinate legislative branch. And federal judges have been educated to respect the States. It comes hard for a federal judge, searching for something as tenuous as legislative motive, to say that a State or local governing body in bad faith devised a scheme to deny or to dilute voting rights guaranteed by the Constitution.

The inference of a racially discriminatory purpose is not as simple to draw as one would think from a reading of the majority opinion. Palmer v. Thompson, 1971, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438

illustrates this point. In that case a city ordinance, neutral on its face, closed all publicly-operated swimming pools in Jackson, Mississippi, a few days after a court ordered the pools desegregated. "Almost everyone in Jackson, Mississippi,knew the city closed its swimming pools solely to avoid integration.[1]" The Mayor of Jackson flatly stated that the city would not operate integrated pools. The record strongly supported an inference of segregative intent from the circumstances incident to the closing of the public swimming pools. The Supreme Court, however, noted that the Court has never "held that a legislative act may violate equal protection solely because of the motivation of the men who voted for it".[2]

1. Brest, Palmer v. Thompson, 1971 S.Ct. Rev. 95, An Approach to the Problem of Unconstitutional Legislative Motive.

2. The Court distinguished Griffin v. Prince Edward County School Board, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) and Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) on the ground that "the focus in those cases was on actual effects of the enactments" rather than on motivation. Four members of the Court found either discriminatory purpose or effects or both.

403 U.S. at 224, 91 S.Ct. at 1944. The Court accepted the City's explanation that it had closed the pools to avoid violence (cf. Cooper v. Aaron, 358 U.S. 1, 785 S.Ct. 1401, 3 L.Ed.2d 5 (1958)) and because the pools could not be operated economically.

I would distinguish cases involving voting rights from all other types of equal protection cases.[3] "[T]he political franchise of voting" is "a fundamental political right, because [it is] preservative of all rights." Yick Wo v. Hopkins, 1886, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed.2d 220. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." Reynolds v. Sims, 1964, 377 U.S. 533, 555, 84 S.Ct. 1362, 1378, 12 L.Ed.2d 506.

3. In particular, it is clear that Congress has the power to omit any requirement of "purposeful discrimination" from the civil rights act. Griggs v. Duke Power Co., 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); Arlington Heights v. Metropolitan Housing Development Corp.

The safe and sure test for the constitutionality of a voting plan is proof of invidious effects, such as the failure to give due weight to votes of members of a minority group. When there is clear proof of this effect, I disapprove of resorting to a dowser to divine whether under an "aggregate" of surface factors there is an unconstitutional legislative motive.[4]

II.

There is no doubt that a provable racially discriminatory legislative purpose fortifies the plaintiffs in a case based on the equal protection clause of the fourteenth amendment. But under the fifteenth amendment, proof of such a purpose is irrelevant. Washington v. Davis and Arlington Heights did not involve the fifteenth amendment. Indeed, no Supreme Court opinion holds that voting dilution is insufficient to

4. My position is this case is unrelated to the traditional use of legislative history to determine legislative purpose as an aid to statutory interpretation. Also, stated in other terms, one might say that in the area of voting discrimination, as in some other areas, for example, cases involving segregated facilities, even before congressional action the possibility of a nonracially motivated purpose is so minimal that it should not be allowed to cloud the picture.

stablish a violation of the fifteenth amendment without proof of a discriminatory legislative purpose. Furthermore, even if the majority imports an intent requirement into the fifteenth amendment itself, in Bolden and Thomasville the plaintiffs alleged violations of the Voting Rights Act of 1965 (42 U.S.C. §1973) and the Civil Rights Act of 1870 (42 U.S.C. §1971).

The fifteenth amendment provides that the "rights of citizens of the United States to vote shall not be denied or abridged. . .on account of race." There is nothing in the amendment itself requiring proof of legislative purpose. The need for a discriminatory intent in most cases arising under the equal protection clause was not conclusively established until Washington v. Davis. Many courts and commentators have taken a different position.[5]

5. See, e.g., Metropolitan Housing Devel. Corp. v. Village of Arlington Heights, 7 Cir. 1975, 517 F.2d 409, rev'd, 1977, 429 U.S. 252, 97 S.Ct. 555, 54 L.Ed.2d 772; Davis v. Washington, 1975, 168 U.S.App.D.C. 42, 45-47, 512 F.2d 956, 959-61, rev'd, 1976, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597; Douglas v. Hampton, 1975, 168 U.S.App.D.C. 62, 67, 512 F.2d 976, 981; Bridgeport Guardians v. Bridgeport Civil Service Comm'n, 2 Cir. 1973, 482 F.2d 1333, 1337; Cisneros v. Corpus Christi Indep. School Dist., 5 Cir. 1972, 467 F.2d 142, 148, cert. denied, 413 U.S. 920, 93 S.Ct. 3053, 37 L.Ed.2d 1041; Castro v.
(Footnote continued on next page)

The majority here gives no reasons for reading the fourteenth amendment requirement, as construed in Washington v. Davis, into the fifteenth amendment. The fundamental importance of the right to vote argues for expansive protection of that right.

(Footnote continued from preceding page)
Beecher, 1 Cir., 1972, 459 F.2d 725, 732-33; Chance v. Board of Examiners, 2 Cir. 1972, 458 F.2d 1167, 1175-76; Hawkins v. Town of Shaw, 5 Cir. 1971, 437 F.2d 1286, 1291-92, aff'd en banc, 461 F.2d 1171 (see especially my concurring opinion at 1174); Southern Alameda Spanish Speaking Organization v. Union City, 9 Cir. 1970, 424 F.2d 291, 295-96. (dictum). Several Supreme Court opinions could have led observers to believe that intent was irrelevant to equal protection challenges. See Palmer v. Thompson, 1971, 403 U.S. 217, 91 S.Ct. 1940, 29 L.Ed.2d 438; Wright v. Council of City of Emporia, 1972, 407 U.S. 451, 92 S.Ct. 2196, 33 L.Ed.2d 51. See also Keyes v. School Dist. No. 1, 1973, 413 U.S. 189, 217, 224-32, 93 S.Ct. 2686, 37 L.Ed.2d 548 (Powell, J., concurring and dissenting). A sampling of the commentators who have advocated tests involving less intent than Washington v. Davis includes Goodman, De Facto School Segregation: A Constitutional and Empirical Analysis, 60 Calif.L.Rev. 275 (1972); Perry, The Disproportional Impact Theory of Racial Discrimination, 125 U.Pa.L.Rev. 540 (1977) (although he excludes voting cases from his theory); Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv.L.Rev. 1 (1977); L. Tribe, American Constitutional Law 1028-32 (1978); Fiss, Groups and the Equal Protection Clause, 5 J.Phil. & Pub.Aff. 107 (1976); Eisenberg, Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication, 52 N.Y.U.L.Rev. 36 (1977).

When the focus of our inquiry shifts from the right to vote under the equal protection clause to the right to vote under the fifteenth amendment, even stronger reasons appear for rejecting legislative intent, motive, purpose, whatever name is given to the leap from evidentiary facts to proof of the legislative objective. Most states do not tie the legislature's hands with records of committee reports and debates. After Brown, in controversial racial decisionmaking sophisticated, facially neutral discrimination soon replaced overt discrimination. Consider, for example, the progression from the grandfather clause to the understanding clause to the lily white primary to the literacy test and eventually, by phases, to an absolute facially neutral citizenship test administered not arbitrarily but fairly. United States v. Louisiana.[6] With almost all eligible whites registered in a voting district, the citizenship test--which applied to blacks and whites equally--resulted in effectively discriminating against unregistered blacks. As to the citizenship test, no evidence, except the historical pattern and

6. United States v. Louisiana, E.D.La. 1963, 225 F.Supp. 353, 380; aff'd Louisiana v. United States, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

the effect, bore on the question of unconstitutional legislative objective.

The fourteenth amendment's equal protection clause is a broad statement, without self-evident limits. Its requirement of "equal protection of the laws" is subject to many interpretations. The doctrinal apparatus applicable to equal protection claims is far removed from the exact words of the amendment. The Supreme Court has long read equal protection to forbid either completely irrational state actions, or activities which "invidiously discriminate" against various groups. Although I believe that an intent requirement has no place in voting dilution cases under either amendment, I concede that the concept of discrimination, the judicial gloss central to our understanding of equal protection, may include a notion of intent. To discriminate is to make distinctions. This involves an element of choice missing in non-conscious differences of treatment. Many commentators have seen as the core of harmful discrimination the stigma that attaches to people who are told they are second-class citizens.[7] This stigma might be

7. See, e.g., Cahn, Jurisprudence, 30 N.Y.U.
(Footnote continued on next page)

seen to arise only from intentional insults, those involving purposeful discrimination.

An intent requirement serves two functions in equal protection litigation.

(Footnote continued from preceding page)
L.Rev. 150 (1955); Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421 (1960); Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv.L.Rev. 1, 8-12 (1975); Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv.L.Rev. 1, 5-11 (1977); Fiss, Groups and the Equal Protection Clause, 5 J.Phil. & Pub.Aff. 107 (1976). Of course, it must be admitted that intent and stigma are not neatly overlapping concepts. A person may feel oneself stigmatized by an action actually taken for nondiscriminatory reasons.

There are hints that the Supreme Court may consider the stigmatizing nature of government actions important in judging their validity. See United Jewish Organizations of Williamsburgh, Inc. v. Carey, 1977, 430 U.S. 144, 165, 97 S.Ct. 996, 1009, 51 L.Ed.2d 229, where the plurality opinion points out that although the state deliberately used race in its deliberations,

> "its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment."

See also Comment, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12 Harv.Civ.L./Civ.R.L.Rev. 725, 755-61 (1977); Anderson v. Martin, 375 U.S. 399, 84 S.Ct. 454, 11 L.Ed.2d 430 (1969).

It seems to comport with our notion of the central meaning of equal protection--the absence of "discrimination"--and it provides a tool with which to limit the otherwise long reach of the principle. As Justice White, writing for the majority, pointed out in Washington v. Davis, a reading of the equal protection clause completely devoid of an intent requirement would

> "raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."

426 U.S. at 248, 96 S.Ct. at 2051.

An intent requirement is not needed to prevent these problems with the fifteenth amendment. Unlike the fourteenth amendment's ambiguous "equal protection of the laws", the fifteenth amendment demands that the right to vote not be "abridged". This command can be read without the elaborate judicial gloss necessary to make sense of equal protection, specifically, without involving "discrimination". Instead, the words could be given a plain meaning: the right to vote should be the same for citizens of all races. Given the recognized importance of the right to

vote, such a preferred position is understandable. In light of the development of the right to vote under both amendments in the past century, the equality involved is the equal opportunity to elect representatives. It is an effective equality, although not a guarantee of equality of result--after all, the right to vote was protected, not the right to vote for the winning candidate. In the town of Fairfield, where the number of black voters was about the same as the number of white voters, given no abridgement of their right to vote, blacks had an equal opportunity with whites to elect representatives. In the City of Shreveport, where blacks were 34 percent of the population (black registration had a small percentage), facially neutral at-large voting for city commissioners effectively diluted the black vote--regardless of the purity of motive of the Lousiana legislature in establishing the system in 1910, when no blacks voted.

Furthermore, the fifteenth amendment by its terms is less expansive than the equal protection clause. Reading of this amendment as dealing with effects, not legislative intent, does not throw into question taxing, welfare, and regulatory schemes;

merely voting schemes. And it is limited to racial groups.

The reasons for restricting the equal protection clause do not apply to the fifteenth amendment. When a government adopts a system of voting that, considered in light of the Zimmer factors, places black citizens at a disadvantage, the government's reasons are irrelevant. The right to vote has been abridged.

The majority cites cases where violations of the fifteenth amendment were found in situations of purposeful discrimination. It recognizes that it must prove the converse proposition: that purposeful discrimination is required for making out a violation. But the majority does not analyze the problem. The majority rests it conclusion on two cases: Wright v. Rockefeller and Bradas v. Rapides Parish Police Jury.

There is little authority one way or another. Until Washington v. Davis, there was no apparent need for black plaintiffs, or the judges reviewing their claims, to distinguish between the right to vote under the two amendments. Wright involved a gerrymander, not a voting dilution case. There, the parties framed the question as whether the lines had been purposefully drawn

on racial grounds. The Court affirmed the decision of a three-judge court, finding that the plaintiffs had not proved either racial motivation or that the legislature "in fact drew the district on racial lines." The Court further noted that it was not obvious that the lines, as drawn, were to the disadvantage of blacks. Three districts were majority non-white districts, one was almost totally white. As the Court pointed out, some of the black voters involved might strongly contest an effort to divide their numbers more evenly. The case is distinguishable from these cases because it was a gerrymander, and because no abridging of black voting strength was clear. Toney v. White, discussed below, demonstrates that Bradas is not the only word in this Circuit on intent and the fifteenth amendment.

The precedents cited by the majority are weak. The reasons given by the majority are non-existent. Whatever the status of intent and the right to vote under the equal protection clause, intent should be irrelevant to the fifteenth amendment.

Even if an intent requirement is read into the fifteenth amendment, plaintiffs are not foreclosed from making a case on differential effects. The plaintiffs in Bolden

brought suit under 42 U.S.C. §1973; the plaintiffs in Thomasville sued under both §1973 and §1971(a)(1).

Under Section 2 of the fifteenth amendment, Congress has the power to enact laws to carry out the purposes of the amendment. These laws may provide greater protection to voters than exists by force of the constitution alone. South Carolina v. Katzenbach, 1966, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed2d 769. Some of the provisions of the laws enforcing the fifteenth amendment speak to the Attorney General, some to the rights of individual voters. None of them requires discriminatory intent; at best, for the majority, purpose and intent are alternatives.

Section 1973c is different in providing that changes in the election laws of covered jurisdiction must be shown not to have the purpose and will not have the effect of denying or abridging minority voting rights. The Attorney General, however, has refused to authorize reapportionments under this provision on the ground that they had the effect, regardless of purpose, of diluting minority voting strength, without consideration of intent. See United Jewish Organiza-

tions of Williamsburgh v. Carey, 1977, 430 U.S. 144, 97 S.Ct. 996, 51 L.Ed.2d 229.

Section 1973a(b) bans "tests or devices" in certain jurisdictions unless they were found not to have been used for ten years "for the purpose or with the effect of denying or abridging the right to vote on account of race of color. . . ." [emphasis added]. This is clearly stating purpose and effect in the alternative. The tests and devices involved were

> "any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class."

42 U.S.C. §1973b(c). These provisions speak only the language of effect, making intent irrelevant when the reapportionment abridges the right to vote, or the test determines eligibility.

Section 1973 comes from §2 of the same Act, the Voting Rights Act of 1965. It provides that "no voting qualification

or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right to any citizen of the United States to vote on account of race or color". This provision was aimed at subtle as well as obvious state regulations which have the effect of denying citizens their right to vote because of race. Allen v. State Board of Elections, 1969, 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1. Similarly, Section 1971(a)(1), derived from the Civil Rights Act of 1870, provides that all citizens "shall be entitled and allowed to vote. . . without distinction of race".

These provisions are part of a legislative scheme to protect the voting rights of black Americans from both intentional and unintentional diminution. They speak of abridging, without requiring intent. Congress must have intended that those aggrieved have the power to protect their rights to the same extent as the Attorney General. I conclude, therefore, that intent is not required to make out a case under Section 1971(a)(1) or Section

1973.[8]

This Court has come to the same conclusion. In Toney v. White, 5 Cir. 1973, 476 F.2d 203, the plaintiffs challenged discriminatory election practices on both statutory and constitutional grounds. The Court held that any intent to discriminate was irrelevant.

> The Civil Rights Act of 1870, as amended, 42 U.S.C. §1971(a)(1) forbids any distinctions based on race in the voting process. And Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, prohibits imposition of any practice or procedure which has the effect of denying or abridging the right of any citizen to vote on account of race or color. [emphasis added]

Id. at 207. This reasoning was affirmed by the Court, en banc, 5 Cir. 1973, 488 F.2d 310. Only one judge expressed any reservation about the adoption of a pure effect test. 488 F.2d at 316-17 (Judge Gee, concurring in the judgment). His concurrence makes it absolutely clear that the en banc decision of the Court was based on the conclusion that effect alone was sufficient to prove a violation of these statutes. See also Gremillion v. Rinaudo, E.D.La. 1971, 325 F.Supp. 375, 377.

With due deference to my brothers on the panel, to me the proof is convincing in this case that the effect of the pertinent law was to reduce the value of each black's vote. To require the plaintiffs to prove an unconstitutional legislative motive is to burden the plaintiffs with the necessity of finding the authoritative meaning of an oracle that is Delphic only to the Court.

8. Different treatment of similar legislative and constitutional provisions would not be without precedent. While Washington v. Davis found that an intent test applied to an employment discrimination claim brought under the equal protection component of the Fifth Amendment, it specifically reaffirmed that such an intent was not necessary under Title VII. 426 U.S. at 246-48, 96 S.Ct. 2040. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158. Similarly, although the Court struck down the equal protection challenge to the zoning laws of Arlington Heights, it remanded the case for consideration of the statutory issues. On remand, the Court of Appeals held that a violation of Title VIII could be made out without proof of a discriminatory intent. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 7 Cir. 1977, 558 F.2d 1283. Accord, United States v. City of Black Jack, 8 Cir. 1974, 508 F.2d 1179, 1184-85.

Reverend Charles H. NEVETT et al., Individually, and on behalf of all others similarly situated, Plaintiffs-Appellees Cross Appellants,

v.

Lawrence G. SIDES, Individually, and in his capacity as Mayor of Fairfield, Alabama, et al., Defendants-Appellants Cross Appellees.

No. 75-1864.

United States Court of Appeals,

Fifth Circuit.

June 8, 1976.

Before RIVES, GOLDBERG and GEE, Circuit Judges.

RIVES, Circuit Judge:

Three black citizens who presently reside in Fairfield, Alabama, brought this action on behalf of themselves and all other black citizens residing in Fairfield. The defendants are the City of Fairfield, a municipal corporation, the Mayor of Fairfield, the members of the Fairfield City Council, the City Clerk, and the State Attorney General. The plaintiffs

charge that, as applied, the state statute which governs municipal elections in Fairfield[1] operates to unconstitutionally dilute voting power.

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1. Ala.Code tit. 37, §426 (Supp. 1973): "Election of president of council and aldermen.--In cities having a population of twelve thousand or more, there shall be elected at each general municipal election the following officers, who shall compose the city council for such cities, and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members: A president of the city council, and in cities having seven wards or less, two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except in cities of less than twenty thousand population, in which two aldermen from each ward shall be elected by the electors of the city at large; in cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen fourteen exclusive of the president of the council; and in cities having fifty thousand population or more the city council may create not exceeding twenty wards. The president of the council shall have the right to vote on all questions the same as any other member of the council. Provided however, that

(Footnote continued on next page)

After answers of the defendants, and further refinement of the issues by the

(Footnote continued from preceding page)
the city council of any city having a population of twelve thousand or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large. And provided further, that the city council of any city having a population of more than thirty thousand, according to the last or any subsequent federal decennial census, or according to any census of such city made pursuant to article 3 of chapter 10 of this title, or Act No. 845 of the Acts of 1953 (sections 481(1) and 481(2) of this title,) and having only five wards, may, by ordinance or resolution adopted by two-thirds vote of the city council, at least six months prior to a general municipal election, provide that the city council shall consist of a president and five aldermen. If such an ordinance or resolution is adopted one alderman shall reside in each of the respective wards of the city, the president and all the aldermen shall be elected by the voters of the city at large, and the president shall vote only in case of a tie." (emphasis added)

The complaint seeking declaratory and injunctive relief was filed May 30, 1973. Without dispute, the population of Fairfield is between 12,000 and 20,000. For purposes of conducting municipal

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pre-trial order, voluminous evidence was introduced. The evidence consisted of documents, testimony from witnesses, and interrogatories and answers thereto by the parties. After each of the two hearings was conducted, the district court dictated into the record the court's findings of fact and conclusions of law.

On February 20, 1975, after the conclusion of the first hearing, the district court "Ordered and Adjudged that parties present a plan to the Court, by May 1, 1975, consistent with the Court's directions as dictated in the Court's findings of fact and conclusions of law."

Pursuant to that order, six different plans were presented, four by the plaintiffs and two by the defendants. The

(Footnote continued from preceding page)
elections, the City is divided into six wards, each containing an approximately equal number of voters. Two council members residing in each ward are elected at-large by the voters. The Mayor of Fairfield whose duties and functions are outlined by state law, is also elected by the voters of the City as a whole. In addition, there is a president of the city council elected by the City voters at-large. The legislative powers and certain other functions are vested in the city council which has a total membership of thirteen, that is, the twelve regular council members plus the president of the City Council.

second hearing was on those plans, and the hearing concluded May 24, 1975. On June 6, 1975, the district court entered its final judgment as follows:

It is ORDERED, ADJUDGED and DECREED as follows:

1. The defendants' motion for reconsideration of the court's order of February 20, 1975, requiring modification of the existing system of election of members of the City Council of the City of Fairfield, is hereby denied.

2. Subject to possible modification under the conditions set forth in paragraph 3 below, the City of Fairfield, Alabama, beginning with the City Council elections of August, 1976, shall institute the following system of selection of a nine-member City Council to replace the system currently in effect pursuant to Title 37, §426 of the Alabama Code:

(a) Eight members of the council shall be elected from single member districts whose boundaries shall follow the outline of districts submitted by the plaintiffs in their plan for eight districts, each member to be elected solely by the

voters of his or her respective district.

(b) A city council president, having the powers and duties specified by the laws of the State of Alabama, shall be elected at large by the voters of the City of Fairfield.

3. In the event there is conducted an official special census of the City of Fairfield, the City Council may within two months after the completion of the special census, but not later than May 1, 1976, request modification of the system of election set forth above, in which event the parties may submit to the court new proposals for the selection of members of the city council from districts apportioned according to the results of the special census.

4. There being no just reason for delay, this judgment shall constitute a final judgment in this case, though the court retains jurisdiction of the case for the limited purpose of possible future reconsideration of this judgment under the conditions specified above.

5. Costs are hereby taxed against the defendants. Plaintiff's motion for

award of attorney's fees is denied.

Done this the 6th day of June, 1975.

Sam C. Pointer, Jr.

UNITED STATES DISTRICT JUDGE

The defendants filed a notice of appeal from each of the orders and judgments; the first entered on February 20, 1975, and the second on June 6, 1975. The plaintiffs moved for reconsideration of the district court's denial of attorney's fees, and on June 20, 1975, the district court refused to reconsider and again denied plaintiffs' motion for attorney's fees. The plaintiffs filed notices of appeal from the order of June 9, 1975, and from the order of June 20, 1975.

The relevant fact findings were either intermingled with or preceded Judge Pointer's conclusions of law. None of the findings of fact, considered separately from the intermingled conclusions of law, can be set aside as clearly erroneous. Rule 52(a) F.R.Civ.P. We attach to this opinion the findings of fact and conclusions of law made after the hearing which concluded February 20, 1975, as Appendix A, and those which concluded after the hearing of May 24, 1975, as Appendix B.

The appeals and cross appeals of the parties present for this court's disposition the following issues: (1) Did the district court err in deciding that the Fairfield City Council was malapportioned? (2) Did the district court err in rejecting the two plans presented by the defendants or in accepting one of the plans presented by the plaintiffs? (3) Did the district court err in adding one at-large member to the plaintiffs' suggested single-member plan? (4) Did the district court err in refusing to grant plaintiffs an award of attorney's fees? We vacate the judgments and remand the case for further proceedings not inconsistent with this opinion as more specifically outlined in the concluding paragraph.

In Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc),[2] after recognizing that multi-member districting schemes are not per se unconstitutional, id. at 1304, we stated that when there is no claim of a racially motivated gerrymander, plaintiff has the burden of proving that a

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2. Affirmed ". . .but without approval of the constitutional views expressed by the Court of Appeals" East Carroll Parish School v. Marshall, ___U.S.___, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976).

plan operates to dilute the voting strength of racial elements in the population in order to establish the existence of a constitutionally impermissible redistricting plan, and we outlined the factors that prove dilution:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. . . .[A]ll these factors need not be proved in order to obtain relief.

Id. at 1305. See also Wallace v. House, 515 F.2d 619, 623 (5th Cir. 1975) vacated and remanded on other grounds, __U.S.___, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976)(per curiam). As indicated in Appendices A and

B to this opinion the district court made several findings of fact[3] and then treated each of the standards prescribed in Zimmer, finding that the political process is relatively open now, though not in the past.[4]

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3. The court determined that blacks represent 48% of the population in Fairfield and have at least 50% of the registered voters--while the figures show that blacks have 500 fewer registered voters, the lower vourt found that since federal registrars registered 585 voters under the Voting Rights Act, most of those presumably black, blacks have at least as many, if not more, registered voters now; that blacks had won six of the thirteen council positions in 1968, which was the first time, with one exception, that any black had wom [sic] a position on the council; that no blacks won in 1972, but that if blacks had voted in the same percentage as whites, they would have elected nine council members (assuming bloc voting); and that there has been substantial bloc voting. The foregoing is paraphrased from the Appendices.

4. The court said: "[I]t is possible for blacks to prevail under the existing system. But. . .that has not been the result with one exception."; the district court further concluded that there has been racial discrimination in the past, but that apparently there has been none in recent years; that the political process has been far more responsive when blacks were on the city council, but not totally unresponsive when blacks were not represented. The foregoing is paraphrased from the Appendices.

Having dutifully followed Zimmer, the trial court concluded as follows:

> "The Court finally ends up with the proposition that the various standards and indicia that have been prescribed by the appellate courts are not helpful one way or the other in this case. And it ends up with this Court having to decide under the basic standards, does the present system, regardless of purpose, operate to minimize or cancel the voting strength of the blacks in the City of Fairfield. After belaboring, as I feel I must under these decisions with the principles that are involved and finding that they don't really help, I come to that question, which is the one I stated off with, and I rule in favor of the plaintiffs.
>
> I believe that this plan [though not by Fairfield's design]. . .simply does operate to inhibit and has inhibited the voting strength. . . .It is possible and has been that at some particular election that could be reversed, but in practice it has worked that way, and as I view what the Supreme Court has said, that means the system is due to be changed. . . ."

While we sympathize with the trial court's dilemma in light of its inconclusive findings, we cannot affirm the ultimate conclusion of a dilution without findings

of fact to fit proper standards. To hold merely that the plan unintentionally "simply does act to inhibit and has inhibited voting strength" and that "in practice it has worked that way" is not enough. Before a court can devise a remedial plan, it must first have found a constitutional violation. As the Supreme Court said in Dallas County v. Reese, 421 U.S. 477, 95 S.Ct. 1706, 1708, 44 L.Ed.2d 312, 315 (1975):

> [A] successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population.

Such findings must be based on the criteria that the Zimmer and Wallace courts distilled from White v. Regester, 412 U.S. 755, 765-767, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314, 324-325 (1973) and in accordance with all later cases. Unless those criteria in the aggregate point to dilution, i.e., if the criteria "don't really help", then plaintiffs have not met their burden, and their cause must fail. Specifically, the trial court's findings may be read as indicating that elections must be somehow so arranged--at any rate where there is

evidence of racial bloc voting--that black voters elected at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires. Therefore, we remand to the district court to reconsider its findings according to the indicia of dilution stated in Zimmer and other cases and to redetermine the ultimate question of dilution vel non in light of its conclusions with respect to these criteria.[5] If

5. If the district court on remand properly finds unconstitutional dilution, then the district court should reconsider its addition of one at-large member to an otherwise single-member district plan in light of the intervening Supreme Court decision in East Carroll Parish School Bd. v. Marshall, ___ U.S. ___, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam), aff'g Zimmer v. McKeithen, 485 F.2d 1297 (1973) (en banc), which reaffirmed the rule that when district courts must fashion a reapportionment plan to replace state legislation found constitutionally infirm, it should adopt a single-member-district arrangement unless there are "special circumstances." Id. ___ U.S. at ___, 96 S.Ct. at 1085, at 299. See also Wallace v. House, ___ U.S. ___, 96 S.Ct. 1721, 47 L.Ed.2d 296, 44 U.S.L.W. 3607 (1976) (granting certiorari from our decision, 515 F.2d 619 (5th Cir. 1975) which fashioned a "mixed" plan with one of five aldermen elected at-large) vacating the judgment, and remanding for reconsideration in light of East Carroll; Beer v. United States, ___ U.S. ___, ___, 96 S.Ct. 1357, 47 L.Ed.2d 629, 639-40 (1976). If it finds dilution, the lower court should also reconsider its
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fees are awarded by the district court on remand they should be for all of the services of plaintiffs' attorney, including his services on the present appeal.

Costs of appeal are taxed against the defendants-appellants. The mandate of this court shall issue forthwith. F.R.A.P. Rule 41(a).

VACATED AND REMANDED.

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denial of attorney's fees in light of Section 402 of the Voting Rights Act amendments of 1975, P.L. 94-73, which adds a new section 14(e) to Voting Rights Act, 42 U.S.C. §1973 l (e) that gives the district court discretion to authorize recovery of attorney's fees by prevailing party in any action to enforce voting rights created by the fourteenth and fifteenth amendments. For the statute's application to reapportionment suits under 42 U.S.C. §1983 (1970), see 121 Cong.Rec. 4735 (daily ed. June 2, 1975) (remarks of Congressman Drinan); id. at 4720 (remarks of Congressman Edwards); S.Rep. No. 94-295, 94th Cong., 1st Sess. 40 (1975), U.S.Code Cong. & Admin. News 1975, p. 774.

[The following dictated opinions, reproduced by the Court of Appeals, are the opinions of the United States District Court for the Northern District of Alabama, Nevett v. Sides, No. 73-P-529.]

APPENDIX A

THE COURT:

The Court at this time will enter findings of fact and conclusions of law based on the evidence that has been presented in this case.

This evidence consists of testimony from witnesses, interrogatories and answers thereto filed by the parties, and certain documentary evidence in addition.

The case is brought into court under the provision of Title 28 for jurisdictional purposes, and Title 42, Section 1983, for purposes of the cause of action. The charge essentially is that the defendants, acting under color of law, have deprived or are depriving certain citizens, namely the plaintiffs, or [sic] rights and privileges under the Constitution of the United States. There is no doubt but that the defendants in what they are doing in and about the election process are acting under color of law. Indeed they are acting as directed by state law, and they do not deny that.

The City of Fairfield is a municipal corporation which falls in the classification of between twelve thousand and twenty thou-

sand population. Its legislative powers and functions are vested by law in a city council. The city council has plenary power over a variety of activities, including the raising and spending of funds generally, the passage and enactment of ordinance, including improvement ordinances, the awarding of or approval of certain contracts for improvement, the appointment of a number of boards and agencies of the city, and indeed the selection of certain persons to simply be employees of the city on submission or of recommendation from the Personnel Board of Jefferson County. Under the state law which goes back to 1909, the city of the size of Fairfield is directed to elect its councilmen or perhaps the terminology would be council persons which I will reject insofar as this opinion is concerned--to elect those by voting at large.

Depending upon the number of councilmen to be elected, the law permits or directs that they have residency requirements according to wards that are drawn up or that they be elected at large without regard to particular residences within the city. Fairfield within the statute has elected to have six wards, and under this provision

of law this means that there are two councilmen to be elected with respect to each of the six wards, though they are elected by the city as a whole. In addition, there is a president of the council elected by the city at large without regard to residency within the city. And there is a mayor whose duties and functions of course are outlined in state law. Some of the remarks I made about the powers and functions of the city council are, of course, subject to certain companion rights and duties that are given to the mayor by state law.

The City of Fairfield is not that different from many other cities in the State of Alabama, at least in the sense that until quite recently blacks were not elected to public office within that city and shared very little of the decision-making processes of the city. Apparently until 1964 there were no blacks appointed to the city boards and agencies of Fairfield, but there have since that time been appointments of black men and women to various positions of leadership within the city. Until 1968 no black, however, had been elected to a city public office in Fairfield.

In 1967 blacks qualified to run for city office, one, without regard to residency, being for the position of president of the city councl, and the other six running for ward positions. All six of those who ran for ward positions were elected by the voters at large in 1968. The council then from 1968 into 1972 was comprised of seven whites and six blacks.

In 1972 there were again blacks and whites qualifying to run for office for the city offices. A large number of blacks qualified than had in 1968. Fewer whites, I believe, qualified to run in 1972, no doubt as at least in part the consequence of not wanting to fragmentize or split the white vote; and I think perhaps only in one instance was there a vote for a councilman from a ward in which there was more than one white in the original race and facing a black. In the '72 election none of the blacks were elected. And since 1972 then we have a situation that there is a city council of thirteen whites and no blacks and a white mayor.

The thing that may make a case a little but [sic] unusual is the relatively high proportion of blacks with respect to population in the city. In the 1950 or

1960 census, perhaps both, blacks constituted a majority by a very slim margin of the population of the City of Fairfield. In the 1970 census, black constituted approximately 48 percent of the population of the City of Fairfield. Well, the Court does not have information as to the percentage of registered voters which were black back in the 1950's or even earlier.

The Court has been provided by evidence with information about the number of blacks or percentages of blacks on the registration lists in the City of Fairfield for the past seven years or so. It appears that at least by 1968 there were or there was as high a percentage of blacks who were registered as voters within the City of Fairfield as there was of whites. Indeed the evidence presented by the plaintiffs indicated that blacks in the year 1968 constituted a higher percentage of registered voters within the City of Fairfield than they did a percentage of population within the City of Fairfield. This assumes for the type of calculation that the population ratio in '68 was approximately that which was reflected in the census information of 1970, and also assumes that of the 883

persons who were enrolled under the Federal Registration Voters Procedure, virtually all of those were black. The registration of blacks as voters has continued to be relatively high, at least, or I should say, relatively at the same rate as the registration of whites in comparison with population. I should again emphasize this is only speaking to what the situation has been over the last seven years. The Court is not blinding itself to the likelihood that fifteen years ago or at some point blacks were qualified to vote at a much lower percentage than were whites. And indeed there has been evidence of that presented.

The voting in the 1968 and 1970 elections has been presented to Court by a series of exhibits. The Court has subjected those to some scrutiny and study. It particularly has made comparisons between the votes received by various candidates in various wards and the population within those wards, and particularly the racial composition of the citizens within those wards. The statistics make clear what has been implicit in the testimony, namely, that in the years 1968 and 1972, race has been a major factor in determining the way

people voted within the City of Fairfield at city elections. And there is a very very high correlation between in effect the race of voters and the persons for whom those votes were cast or have been cast in these past two elections.

The Court has also made an effort to determine for purposes of this decision what the population is, and the racial composition is in the various wards, based on 1970 census.

As pointed out by the plaintiffs in the presentation, there are difficulties because there are six census blocks that cross ward lines, and all but one of the wards, namely, ward 2 is affected by the fact that there are census blocks that cross the ward lines. What the Court has done is to take the minimum population figures, that is, those blocks that are totally within a particular ward, used that as a starting point, also then determined the number of citizens and in turn the number of black citizens that are not covered by an allocation based on these wards totally or these blocks totally within wards. I then have apportioned those so-called excess persons, excess only from

a statistical standpoint obviously, among the five wards, wards where there are overlaps, that each of those five wards has a possible difference between minimum and maximum population. I have done the same thing with respect to the number of blacks by wards. The figures I come out with are that Ward I has a projected population as of the 1970 census of 1859 persons of whom 69.77 percent are black, namely, 1297. Ward No. 2 has 1912 persons population in 1970, of whom 88.39 percent or 1690 are black. Ward No. 3 has 1365 persons of whom 52.75 percent or 720 are black. Ward No. 4 has 2590 persons population of whom 59.27 percent or 1535 are black. Ward 5 has 3501 persons in the 1970 population of whom 47.84 percent or 1675 are black. And ward Number 6 has 3142 persons of the 1970 population of which 0.10 or 3 persons are black.

The deviation in population between the several wards is to be done by computing the optimum of what the population of the wards would be if they were divided on a numerical basis and then seeing how each ward stands as a percentage of that optimum. If that caluclation is done, it appears that Ward No. 3 is only 56.99 per-

cent of optimum size, while ward No. 5 is 146.18 percent of optimum size, and ward No. 6 is 131.19 percent of optimum size. This further means that there is a maximum deviation by percentage point between the smallest and the largest of the wards of 89.19 percent. That also means that the largest ward by population size is 2.56 times as large as the smallest.

I, after having made the calculations, I'm not sure that they are that significant in the total context of this case. If this were a case in which the residents of Ward 5 and Ward 6 were coming before this Court saying that they were adversely affected or having their vote diluted by reason of the ward arrangements, they would have a much stronger case under Reese v. Dallas County, Alabama, on standards enunciated by the Fifth Circuit in December of last year in that case. That case really involved a situation where the identifiable group was totally confined within a single ward or division, and though it represented approximately 50 percent of the vote in the population or total population, it could only elect 25 per cent of the representatives. In this case the

identifiable groups that the Court is in essence being asked to look at are whites and blacks; and they are not comfined to one or two wards, but indeed are spread throughout the wards, though of course varying as I have indicated already in terms of the different wards.

The United States Supreme Court in White v. Regester, has indicated for this Court that if some plan of election by design or otherwise operates to dilute or cancel the voting strength of a racial or political group, then under the Constitution of the United States, Fourteenth Amendment, it is in doubt.

There have been a series of cases throughout the country and many in the Southeastern United States which have attempted in the last two years to deal with that pronouncement by the United States Supreme Court. The Fifth Circuit Court of Appeals in Zimmer v. McKeithen, has given the standards for this Court to apply to the pronouncement of the Supreme Court. And this decision by the Fifth Circuit has in turn been applied to a situation for the City of Dothan, Alabama, in February of last year in the case of Yelverton v.

Driggers [M.D.Ala. 1974, 370 F.Supp. 612].

The principal issue for the Court to decide is, does the plan, though required by the state legislature, does it operate to minimize or cancel the voting strength of blacks in the City of Fairfield. It is not for this purpose critical to say that it was intentionally designed for that purpose. Blacks who bring this suit need not prove that. The question is whether it operates to do that. The question is not whether some political group or scientist thinks that individual districts rather than at large multi-member districts are better and in part counsel for plaintiffs argument suggested that approach. That is not enough, though certainly the Supreme Court has indicated that if a Court is to replace or order some new plan, then there must be unusual circumstances for not ordering one that is based upon individual single districts.

Four standards or indicia have been set forth as guidelines, if you will, in making or assisting the Court in arriving at a decision. One is the question of whether the existing system has resulted in a lack of openness to the political pro-

cess by the complaining group, here blacks in the City of Fairfield. The Court has heard mixed evidence on that point. It is clear that blacks have prevailed in six or seven races which they entered in 1968 under this very system. It also seems probably that had more blacks qualified for ward positions in 1968, there would have been a majority of blacks elected to the city council. On the other hand, it is clear that with that one exception, all other election years under this system for variety of reasons has meant that blacks did not attain representation in the form of another black being elected to the city council. What the Court is left with then on this particular point, and I so conclude, is that it is possible for blacks to prevail under the existing system. But it is also true that that has not been the result with one exception.

I should mention that witnesses, I think, have been quite candid, the one that was asked, in saying that there was no difficulty in qualifying to run for the city council. It was essentially from a candidate's standpoint a matter of getting out the vote, of getting more votes than

the opponent or opponents did. There is clear evidence that there is a polarization of votes by those who do vote in the City of Fairfield on city elections. It is clear that enough people did not vote who were qualified to vote to have elected nine out of twelve black candidates in 1972 of their own race, black, if they could have been encouraged and helped or assisted to vote. It's also clear that there is some hesitancy as expressed by one of the witnesses, insufficiently encouraging blacks to involve themselves in the electoral process because of some prior difficulty, particularly in terms of difficulties of registration.

The Court is given a second indicia or factor for this Court to determine, that is, the history of radial [sic] discrimination. I have already indicated that until 1964 there were no blacks on the various boards of the city. The fact that during '68 to '72 when there more blacks on the city council, of almost fifty percent there were a series of blacks appointed to various boards and agencies, indicates rather dramatically the value and significance to the black person in Fairfield of

having blacks on the city council. It also makes some dramatic rendering of the prior situation in which blacks essentially did not serve on these boards. Only on one occasion has there been a black majority on any board or agency of the city, and that related to the financing arrangement for a black or predominantly black college. It was significant to the Court that in describing the method for appointment or for replacement of persons whose terms expired on various boards over the last several years, one of the witnesses identified the positions being vacated and the questions of who would be reappointed in terms of there being a white vacancy or a black vacancy, indicating some conscious characterization by city officials to the effect that boards would not become majority dominated by blacks, but only minority. There is little evidence that has been presented to this Court on as to history of racial discrimination, and little evidence presented by the defendants as to lack of racial discrimination.

I suppose the Court is being asked to take judicial knowledge or notice of a lot of things. Certainly the Court isn't

blind to things that have happened in Jefferson County or in Fairfield or in Alabama. I do not think, however, that it is appropriate to belabor questions of judicial notice in this area. It is certainly true, and the evidence shows that there have been disparities in employment of blacks within the City of Fairfield, black policemen, black firemen, blacks in civil service type jobs or classified service, where only three out of some sixty are black. Only one on occasions. Two out of some twenty policemen have been black, and none of the firemen have been black. That type of evidence certainly demonstrates to the Court's satisfaction that there has been some discrimination involved in times past. Of course there are problems that the city has brought out about some of its hiring policies, and many of them are very dependent upon what some other agent, namely, civil service, may do. Evidence indicated only in one instance has there been a black on the qualification list who has been passed over in recent years in favor of a white.

There is much of the evidence that has been focused here on whether or not

Fairfield has been responsive to the needs of the black community. And I find it very difficult to deal with this subject matter, though the courts have said to me, that is, the appellate courts have said, this is a key factor in deciding this kind of question. I think it is clear that blacks have gotten far more responsiveness from city council when there were blacks on the city council. It's also clear that when there were blacks on the city council, they were more effective in perhaps persuading whites to join them in getting blacks on other city boards. And that way there were blacks on other city boards, though in a minority such as two out of five. They on occasions were successful in having one white join with them to constitute a majority on some particular issue or issues.

Accordingly, following this type of approach, one can say that the lack of councilmen who are black certainly contributes to a lack of responsiveness to the needs of the black community. But it is also true, and the evidence shows this, that blacks have not had the door completely closed in their faces insofar as expressing

their opinions at city council meetings, in seeking assistance, presenting petitions, being heard, and on some occasions being given what amounts to private audiences for the presentation of these matters. While the witnesses have not been too quick to admit it, the Court has sensed that some of these requests have gotten answers, not to the same degree that the witnesses or that the black communities as a whole wanted, but there has not been a total lack of responsiveness merely because there were no blacks on the city council.

The state policy insofar as at large versus district voting is concerned is to this Court's mind rather clear. There is a state policy, and has been for in excess of sixty years, against voting by smaller sub districts in those cities that were less than twenty thousand population. The policy seems clear to the Court that only if a city were larger than twenty thousand was there an opportunity to have district elections as such. What is not clear to the Court, and neither side has introduced evidence, is whether this initial policy of the state legislature back in 1909 was in any way grounded upon racial

consideration or not. Now other courts have found and taken judicial notice of the fact that the 1901 Constitutional Convention in the State of Alabama was almost primarily directed and related to questions of racial concern and of assuring or attempting to insure that whites would be able to control the political processes in the state. Whether the Court can in any way assume that a 1909 act passed by the legislature which is only eight years after a racially oriented Constitutional Convention has any relationship, I'm not sure. I think that a reasonable hypothesis is that this particular matter dealing with at large elections in cities of less than twenty thousand had no racial overtones, but there is no evidence really for the Court one way or the other. It would be pure guesswork as to what might have been the considerations for that passage.

Finally, the Court has been told by a series of appellate decisions to look at a variety of additional factors such as the fact that people run for positions and hence there can be no single shot vote in a multi-member race that might be utilized by a minority to elect someone.

The Court finally ends up with the proposition that the various standards and indicia that have been prescribed by the appellate courts are not helpful one way or the other in this case. And it ends up with this Court having to decide under the basic standards, does the present system, regardless of purpose, operate to minimize or cancel the voting strength of the blacks in the City of Fairfield. After belaboring, as I feel I must under these decisions with the principles that are involved and finding that they don't really help, I come to that question, which is the one I started off with, and I rule in favor of the plaintiffs.

I believe that this plan--and this is not that the City of Fairfield has intentionally designed it; it came from the state legislature--simply does operate to inhibit and has inhibited the voting strength, which has been from 53 per cent to the present 48 per cent or to a turnout rate of 42 per cent, to effectively diminish that voting strength. It is possible and has been that at some particular election that could be reversed, but in practice it has worked that way, and as I view what the Supreme

Court has said, that means the system is due to be changed, is due to be changed giving the preference as the Supreme Court has directed to a single member smaller district which will be elected merely by the people of that particular district and where the size of those particular districts is consistent with the one-man-one-vote principle, which means pretty nearly the same population in each of the districts.

It is not clear to the Court that there is a need for the Court to direct that there be thirteen or fourteen or six or seven districts. I think the question of how many wards would then be electing groups is a matter to some degree of playing with what you have got, the size of areas and the population and configuration. Although the state statute comprehends typically fourteen councilmen, it also comprehends, for example, a system of five councilmen in another way. And I'm not sure that in terms of formulating some plan to carry out the Court's direction, the parties should necessarily be bound to fourteen districts.

The question may arise as to whether there may be some councilmen elected by

district, and then others elected at large. I would say that no more than one could be elected at large. Whether one can be elected at large or not is I think an open question, and I would be willing to see. I think that is the way we ought to handle it, depending on whether there is a request under a plan for there to be one such as council president to be elected at large. There have been some decisions by a variety of courts that have struck down a system, even where there are only two at large, and the rest are by smaller districts. The elections are due in August of 1976.

There should be presented, I think, by the parties, and each party certainly has an interest in this, a plan to accomplish the direction of the Court. I would think that the plans should be presented by June 1st. I don't want to put it off too long, but I think there should be adequate amount of time to look at it and study it and perhaps to use the resources of different groups in the community as well as perhaps outside assistance. I think June 1st would be adequate and still leave plenty of time after that for considera-

tion and decision, if there is no agreement by the parties, and still be able to have that in plenty of time prior to the August, 1976 election.

Perhaps there are questions by the parties that I should pause for.

MR. BARNES:

May it please the Court, the question naturally arises about questions on appeal from the Court's decision today, and I'm in doubt whether this is a final judgment.

THE COURT:

This could not be a final decision. However, since that only deals with the next election, and does not in any way disenfranchise the present council, and there is nothing appealable immediately, it sought [sic] to be appealable after a new plan is developed. For example, there could be an appeal from the Court's requirement for a plan and for what the Court finally determines in direction of the plan, one appeal instead of two. We still have plenty of time, if we do it that way. It may be, since you mentioned it, we ought not to put it off until June 1st to present a plan. Would the parties feel that May 1st is adequate time in which to develop a plan

consistent with the direction of the Court?

MR. STILL:

Your Honor, we can have a plan ready for the Court by the first of May.

THE COURT:

What will be the position of the defendants?

MAYOR SIDES:

I think we can have it ready by May 1st.

THE COURT:

Let's push that date back then to May 1st as the time for submitting reports with suggested plan or plans. It's possible there could be more than one that will be presented as an option. Are there other questions by the parties?

MR. STILL:

No, sir.

THE COURT:

Then the case will stand on this decision, though its does not constitute an appealable judgment, that will have to await approval of a plan so that that will be appealable also.

(Whereupon, proceedings were adjourned at 4:04 P.M., February 20, 1975)

END OF PROCEEDINGS

THE COURT:

The Court will now indicate certain findings and conclusions. These are based upon the evidence that has been produced in this case today together with the plans that have been submitted and received by the Court from the parties prior to today.

Additionally, the court, of course, has before it the matters that were produced and heard in evidence back in February, for what bearing such evidence may have on the adoption of an appropriate plan.

The Court has already indicated that though it considered the matter close, it was adhering to its conclusion announced in February. Namely, that the existing plan for election of alderman [sic] unconstitutionally dilutes the voting rights of black citizens in the City of Fairfield. The Court in February indicated that there should, therefore, be presented appropriate plans to alter for future elections the election method for alderman for the City of Fairfield. It indicated at that time that the basic approach should be through the

creation of wards or election districts from which in the future persons would be elected solely by the voters residing in such districts.

The Court in February indicated that in devising such district plans the parties should be aware that such districts would have to comply not merely with the problems of avoiding dilution of voting rights by particular groups of citizens, but also avoiding running afoul of the so-called one man-one vote principles as announced and enforced by the Supreme Court and other appellate courts.

The Court has received six different plans, four by the plaintiffs and two by the defendants. The Court should adopt one of the plans proposed by the defendants, if possible.

The Court finds that it is not possible to adopt either of the plans proposed at this point by the defendants.

The Court's conclusion is that the plans as submitted run afoul of the one man-one vote requirement. The plans as submitted by the City Council--that is, the plan as submitted by the City Council utilizing (a) the 1970 census figures and (b) those fig-

ures as adjusted by certain proposed changes submitted here today, nevertheless reflect that there is a deviation as expressed in percentage points between the two districts as having the highest and lowest number of people in them, which insofar as the 1970 census is concerned, reflects a variation of 62 percent. Even with crediting adjustments suggested by the defendants reflect a 37 percent variance or span of deviation.

The Mayor's plan, which has not been elaborated upon in this hearing this morning is one that would utilize five separate districts. It likewise has been evaluated in terms of the 1970 census and the '70 census as modified by certain proposed adjustments. It would reflect, viewed upon the 1970 census, a maximum percentage deviation span of some 51 percent, or considering the proposed adjustments, a maximum deviation percentage span of 27 percent. These percentages are far beyond that which is acceptable under the one-man one-vote doctrine. At least that is so where there are not clear historical reasons for identifying and treating the districts uniquely, as might be the case for example, in

recognizing that counties have certain unique qualities. These rather are simply parts of cities which have no unique special governmental characteristics insofar as wards are concerned.

The fact that the deviation is unacceptable is also supported by the facts that plaintiffs have indicated that that range of variation can be avoided by other configurations.

The plaintiffs have come forward with four plans. The maximum variation under these four plans is less than three percent variation between the largest and smallest. That three percent is to be contrasted as to above twenty percent as reflected in the one plan submitted by the mayor, which has the least amount of deviation in any plan submitted by the defendants.

So, it is certainly possible to find arrangements that do not have the kind of variation as reflected in the defendants' plans.

The plaintiffs' figures do not reflect changes since 1970 in population. If full credit be given to the evidence presented by the defendants today as to certain changes in population, it would

indicate that there would be significant variations in population under the plans submitted by the plaintiffs. I think it is possible and proper in an appropriate case to consider changes in population from a preceding census. Nevertheless, such changes should only be considered where they are reasonably accurate and reliable in terms of indicating the present population or the population in some particular point in time.

With all due respect for the witness, Mr. Ellison, I do not believe that the projections as to population changes from 1970 as suggested by his testimony are such as to be reasonably reliable. There are simply too many variables that have not been taken into account. Indeed, some matters that have been brought out suggest that there are infirmatives [sic] by the approach developed by him in an attempt to find out what the present population is.

As will be indicated in a few minutes, there may be a special census yet to be taken by the city. That special census may justify changes from any plan the Court, in effect, puts into effect now.

I do not fault the defendants in any

way for suggesting changes in population or for being unable to show results of a special census. I think all the parties were agreed, however, that it was desirable to go forward now with the adoption of some proposed plan so that that might be reviewed upon appeal, and that it was not wise to simply defer this type of proceeding until some time after a special census might be obtained during the summer.

I find that I cannot accept the plans suggested by the defendants.

I turn my attention to whether the plans, one or more of them, by the plaintiffs should be at least tentatively mandated by the Court subject to certain adjustments that I will talk about.

I do find that these plans do meet the one-man one-vote test insofar as the 1970 census is concerned. Though, it might turn out that they would not, were a special census to be taken.

In looking at the several plans that the plaintiffs have suggested, the court has attempted to follow certain suggestions that, in effect, both sides seem to present. One is that the total voting members on the council should be an odd number so as to

minimize chances of ties. Another is that it is probably preferable to have the number of districts of something less than ten, for example. Even though this would reduce the number of Council members, this seems to me to be rather implicit in certain of the matters that the plaintiffs have suggested as well as being implicit in what the defendants have suggested.

The Court has been troubled in that it did not want to be involved in mandating if it could be avoided, a significant reduction in the number of elected aldermen contrary to the wishes of the people of Fairfield. There is a Supreme Court decision involving changes or reapportionment of a state legislature in Minnesota that, in effect, indicated drastic or significant reduction in size of an elected body should not be mandated by the court under the guise of reapportionment if there were other alternatives available. That was Minnesota State Senate versus Bean.

In this particular case, however, the State law leaves open to the individual cities a fair amount of freedom in determining the size of its city council. It would appear that probably the State law is broad and flexible enough to permit a

city to choose to have a city council composed of four, six, eight, nine, ten, eleven, twelve, thirteen, or fourteen members plus a council president.

The city council and the mayor, by responding to the Court's request for a plan here, by suggesting five or six district plans, have indicated, as I view it, to the Court, that if there is to be a district type election that they would prefer not to have, for example, twelve districts, even though they recognized, according to the council president, that it would be easy enough under their own plan to simply subdivide their six proposed districts, and to come up with a twelve district plan. They have chosen not to do so. So, I take it that there is no policy, from the standpoint of the defendants, to suggest that a large council, that is, something in excess of ten, be established through a large number of districts.

Accordingly, I do not feel that the Court is restricted in this particular case from adopting or approving a plan with something less than twelve districts, even though that would mean a reduction in the total number of aldermen on the City Council.

I take it that is, in effect, the preference if there is going to be a district plan, that there be some reduction.

One of the principal problems is whether or not there should be any at large elections, that is, other than mayor. I believe that there should be, given the facts of this case, an at large election of a president of the City Council. Under Alabama law, the president of the city council does have some unique powers and responsibilities different or in addition to those possessed by the other council members. He is or she is empowered, in effect, to act as mayor during the absence or disability of the mayor. The provisions of Section 428 of Title 37 along with certain opinions of the Attorney General of the State of Alabama indicate the president of the City Council has a special role to play in City government. Of course, if to have such an at large election would result in something that would dilute or cause a dilution of the voting of a particular minority group that might be precluded, but if it can be done in such a way as to preserve an at large election of a president, I believe that is preferable given State policy

consideration.

I believe that the eight member plan as suggested by the plaintiff, coupled with the at large election of a president of the City Council is a very meaningful and satisfactory resolution of this situation. The maximum deviation range expressed in precentage points for the eight persons who would be elected to the council is only 1.89 percent, and the average percentage deviation is point fifty-eight of one percent.

Assuming that the voters were, by and large, to follow racial lines in selection aldermen it would in effect insure that of the total nine member council, that is, counting the president as a member of the council, it would in essence assure that whites would have at least three members on the total voting council and that blacks would have at least three voting members on the council. In effect, three additional members would be to some degree up for grabs, depending upon voter turn out, interest and voter patterns. If there were the same percentage of whites and blacks registering to vote and then turning out to vote on a particular election, if they followed voting

racial patterns in how they voted, it would mean there would be five whites and five [sic] blacks elected, which is relatively comparable to the population proportion within the city. If the whites, again assuming there were this racial pattern in voting, if the whites, in effect got out their vote in a particular election, then, presumably six of the nine seats on the council would be held by whites. If the blacks, in effect, got out their vote to a greater degree than the whites, the blacks could elect six out of nine seats. I don't think it is required that the Court, and I would not do this, come up with some plan or the parties come up with a plan that would guarantee that whites or blacks have a certain number of seats. In selecting between several plans that are available, perhaps some credence should be given to the extent to which the expected voter participation might be generally reflective of the population characteristics.

I think, then, and will do indicate by separate judgment that really just reflects the ultimate conclusion, that for the next election there should be an eight member ward elected city council following the outline of those districts as contained

in the plaintiffs' plan, together with an at large election of a president of the city council.

This judgment, however, should be subject to being modified, that is, the Court should retain jurisdiction if and as necessary so that if there is a special census undertaken, the City Council should, or city government should have the opportunity to come in and request some modification from this plan based upon the results of such a special census.

Any such plan, I would suggest, that might be proposed must take greater account of the one-man one-vote principle than was true in the plans that the Court has had presented to it prior to this time by the defendants. Furthermore, I think it is well to indicate that if district wide plans that are suggested by decision makers who are all white shows a likely increase of white positions over that which would be expected on a purely population basis, there may be some need to sort of justify that the plan they are coming up with is not in any way calculated or motivated in that respect. I am not saying that any such plan, for example, would have to follow to any mathe-

matical degree the voter population figures. If, for example, only there were to be a special census and a plan suggested to the Court which would show that probably 72 percent of the Council members would be white whereas only 53 percent of the population was white, I think the Court would be at least somewhat skeptical and suspicious as to whether there was some other arrangement that would be a little bit more compatible with the legitimate voting interest of the minority. I say that only by way of indicating a type of attitude and not by way of saying there is any requirement as to any particular plan or lack of it.

So, the Court will enter a final judgment as indicated. Of course, that judgment will be subject to appeal. I take it there will be an appeal of it. Upon a resolution of an appeal, should there be an affirmance, in effect, the Court will have retained jurisdiction over the case so as to be able to give consideration to some other plan that might be developed out of information obtained from a special census.

Do counsel have any questions as to the nature of the Court's ruling?

[No response.]

THE COURT:

The costs will be taxed against the defendants.

No attorneys' fees will be awarded pursuant to the Supreme Court's decision of last week.

MR. STILL:

Your Honor, if I may make one statement on that. We would appreciate an opportunity to make a motion for attorneys' fees and present a brief as to why we believe the Wilderness Society versus Morton is inapplicable in the present situation.

THE COURT:

Well, I am going to take it that you have orally made a motion at this time to that effect. I find that there is no common trust fund produced by your efforts, that there is no recalcitrant attitude or punitive measure that is due to be taken against the defendants that might otherwise, perhaps, be a basis for attorney's fees. That while there might be justification for a claim based on the private attorney general theory, that that has effectively been knocked out by the Supreme Court's decision.

MR. DAWSON:

Your Honor, we might further ask that

to be included in the cost to be taxed here would be a reasonable sum for the assistance provided to the Court in the drawings of these various plans.

THE COURT:

The questions of cost are dealt with separately and are not matters that affect appellant's remedy.

You may present in an application on the cost bill such matters. I would have to say that I will be very skeptical as to the allowability of any expenses.

MR. BARNES:

May I ask that if a census should show a substantial change that that might affect the rights of either party to ask for a change in the number of districts.

THE COURT:

Yes. I see the plan that the Court is in effect saying or approving at this point as being subject to modification, whether it is as to number of districts or size and location of them.

Are these any other questions?

[No response.]

END OF PROCEEDING.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1864

REVEREND CHARLES H. NEVETT, ET AL.,
Individually and on behalf of all
others similarly situated,
Plaintiffs-Appellees
Cross Appellants,
versus
LAWRENCE G. SIDES, Individually and
in his capacity as Mayor of Fairfield,
Alabama, ET AL., ETC.,
Defendants-Appellants
Cross Appellees.

Appeals from the United States District
Court for the Northern District of Alabama

(June 30, 1976)

ON PETITION FOR REHEARING

Before RIVES, GOLDBERG* and GEE, Circuit
Judges.

PER CURIAM:

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* For the reason stated in the opinion,
Judge Goldberg did not participate in this order.

Judge Goldberg, a member of the panel which heard this case on May 13, 1976, is on vacation in Europe and will not return until July 7, 1976. In his absence, a majority of the panel (Judges Rives and Gee) vote to deny the motion for rehearing in the above-entitled and numbered cause as they are of the opinion that the panel's decision entered June 8, 1976 is correct as written. Because we did not retain jurisdiction of the case, that part of the motion styled as a "review of the district court proceedings after remand," must also be denied for lack of jurisdiction. A new notice of appeal must be filed before the district court's June 11, 1976 order can be reviewed by the Fifth Circuit. Mandate shall issue forthwith. Rehearing is DENIED.

Alabama Code (1975)

§11-43-40. Composition of city councils; election, terms of office, etc., of president of council and aldermen; right of president to vote.

(a) In cities have a population of 12,000 or more, the following officers shall be elected at each general municipal election, who shall compose the city council for such cities and who shall hold office for four years and until their successors are elected and qualified, and who shall exercise the legislative functions of city government and any other powers and duties which are or may be vested by law in the city council or its members:

(1) In cities having seven wards or less, a president of the city council and two aldermen from each ward, to be elected by the qualified voters of the several wards voting separately in every ward; except, that in such cities having a population of less than 20,000, the two aldermen from each ward shall be elected by the electors of the city at large.

(2) In cities having more than seven wards, one alderman from each ward, and a sufficient number of aldermen from the city at large to make the total number of aldermen 14 exclusive of the president of the council; provided, that in cities have a population of 50,000 or more, the city council may create not more than 20 wards.

(3) In cities having a population of more than 30,000 according to the most recent federal decennial census or according to any census of such city made pursuant to sections 11-47-90 through 11-47-95, and having only five wards, a president of the council and five aldermen, if the city council shall so provide by ordinance or resolution adopted by two-thirds vote of the council at least six months prior to a general municipal election. If such an ordinance or resolution is adopted, one alderman shall reside in each of the respective wards of the city, the president and all of the aldermen shall be elected by the voters of

the city at large, and the president shall vote only in case of a tie.

(4) Notwithstanding the provisions of subdivisions (1), (2) and (3) of this section, the city council of any city having a population of 12,000 or more may by ordinance or resolution, if adopted by two-thirds vote of the city council more than six months prior to any general municipal election, provide that the city council of said city shall consist of five aldermen to be elected from the city at large.

(b) Unless provided otherwise in this section, the president of the council shall have the right to vote on all questions the same as any other member of the council.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

v.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO REVIEW OF THE CAUSE SOUGHT BY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents (defendants in the District Court) do not challenge the portions of the petition for certiorari prior to the "Questions Presented for Review" on page 4, except we deem it necessary to cite under 1 (c), Rule 40 (which corresponds to the matter specified under 1 (d), Rule 23), two additional state statutes which we consider to be involved in this case; and also respondents challenge the right to attack the opinion and judgment of the Court of Appeals rendered on June 8, 1976, the petition for certiorari having been filed too late therefor.

ADDITIONAL STATUTES INVOLVED

The first involves the abolition by the Alabama Legislature of all "anti-single shot" requirements in municipal elections and is as follows:

Act No. 221, General Acts of Alabama of 1961, pages 2234, 2235, approved September 15, 1961, expressly repealed Act No. 606, Acts of Alabama, of 1951 page 1043, which required, in municipal elections, a ballot commonly known as an "anti-single shot", requiring a voter, in order for his vote to be valid, to express his choice for as many candidates as there are place to be filled. The pertinent portion of Act 221 is as follows:

> "Section 1. Whenever nominations for two or more offices of the same classification are to be made, or whenever candidates are to be elected to two or more offices of the same classification, at the same primary, general, special or municipal election, each office shall be separately designated by number on the official ballot as 'Place No. 1,' 'Place No. 2,' 'Place No. 3,' and so forth: and the candidates for each place shall be separately nominated or elected, as the case may be . . . Section 2. All laws and parts of laws in conflict with the provisions of this act, and Section 361, Title 17, Code of Alabama 1940, and *Act No. 606*, Acts of Alabama, Regular Session 1951, page 1043, specifically, are expressly repealed. . . ." (emphasis added).

The Act, while repealing the anti-single shot vote, retained place running for the two candidates in each ward.

The second Act is Act No. 248, General Acts of Alabama of 1945, page 376. It is cited because of a statement made in the petition pertaining to a claim that there was discrimination in the appointment by the City of classified (civil service) employees, particularly policemen and firemen. The Act limits the appointing authority (Fairfield in this case) from filling the vacancy except by selection from

three candidates submitted by the County Personnel Board created by the Act just cited. This Act will be referred to in the argument or place wherein petitioners claim there was discrimination on the part of the City against blacks in the selection of such classified employees, including firemen and policemen. The Act and the record to which we shall refer demonstrate the fallacy and inaccuracy of this statement. It is voluminous, and the pertinent text will be set forth in an appendix, as provided under Rule 40.

The principal applicable statute upon which Fairfield's election system was based in the elections of 1968, 1972 and 1976 is Section 426 of the Alabama Code of 1940, official as last amended in Section 3, Act No. 666, Page 111, Alabama Acts of 1961, amending the 1940 Code Section, by entirely rewriting it in full, including previous amendments.

The section as written in 1961 is correctly set out at page 3 of petitioners' appendix and is also correctly shown in the 1973 Supplement of the 1958 recompiled Code of Alabama (authorized and reliable but not adopted by the Legislature as an official code). The 1975 Code to which petitioners refer did not go into effect until October, 1977.

QUESTIONS PRESENTED FOR REVIEW

Respondents challenge the accuracy of the first two questions presented for review (petition, page 4).

Number 1 is as follows:

> WHETHER A FINDING THAT DILUTION OF THE MINORITY VOTE DOES NOT EXIST MAY BE PREMISED ON A CONCLUSION THAT BLACKS COULD BE SUCCESSFUL AT THE POLLS IF THEY WORKED HARDER THAN WHITES.

While the trial court's findings made following the remandment on the first appeal, dated June 11, 1976, contain the statement that the failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination but rather the consequence of (a) a failure to turn out a higher percentage of black voters than white voters, (b) bloc voting, and (c) at-large voting for numbered places, the court's findings of absence of dilution are not premised upon that particular statement, and this is demonstrated by the paragraph in which the statement was made (page 230, 571 F.2d, Appendix to Court of Appeals opinion), as well as the remainder of the trial court's opinion, which paragraph is as follows:

> "(4) The plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system. The discrimination made known to the court pre-dated the elections in 1968, in which six of the 13 persons elected to the council were black. The failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places.

This isolated statement by petitioners merely says what should be obvious to everyone, and that is that the candidate who wins is the one who receives the higher number of votes, and the one who loses does so because he does not have a sufficient number of votes, for one reason or another, such as a failure of more voters to turn out to vote for him. The trial court's judgment was premised upon a conclusion and finding that the failure to elect blacks was not the result of the denial of the political process or of discrimination and that the evidence was not sufficient to show impermissible dilution of the black vote in the 1972

election. Therefore, respondents do not consider that this constitutes a sufficient statement of a sound, fundamental question presented for review.

Also challenged is the accuracy of Question Number 2, as follows:

> WHETHER THE DEFENDANTS IN A VOTING RIGHTS CASE ALLEGING DILUTION OF THE BLACK VOTE PREVAIL WHEN THE DISTRICT COURT MAKES A FINDING OF 'ULTIMATE FACT' THAT DILUTION HAS BEEN PROVED IN ACCORDANCE WITH THE STANDARDS SET OUT IN *WHITE V. REGESTER*, 412 U.S. 755 (1973), THOUGH NOT PROVED WHEN CONSIDERED UNDER PRECEDENTS OF THE COURT OF APPEALS.

Petitioners necessarily are referring to the trial court's findings after remandment, of June 11, 1976, 99a, because the opinion of the Court of Appeals, 533 F.2d 1361, was rendered June 8, 1976. No attempt to review it in this court was ever made and it is now too late to review the findings involved in the first appeal.

There is no showing in any of the opinions that the District Court, in *Fairfield*, on June 11, 1976, made a finding of "ultimate fact" that dilution had been proved in accordance with the standards set out in *White v. Regester*, 412 U.S. 755 (1973), 37 L.Ed.2d 314, 93 S.Ct. 2332. The finding of fact in *White* with reference to the situation of the blacks in Dallas County is shown on page 766 of 412 U.S., 37 L.Ed.2d 324, and includes the following:

> "With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to partici-

pate in the democratic processes. 343 F Supp, at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.' Id., at 727. Based on the evidence before it, the District Court concluded that 'the black community has been effectively excluded from participation in the Democratic primary selection process,' id., at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner."

It is shown, inter alia, that blacks could not have themselves slated as candidates.

Since petitioners urge this same point in their Statement of the Case, we feel justified in reciting the findings of fact

in *White v. Regester* prior to the argument and at this point, hoping for the Court's approval.

The finding of the plight of the Mexican-Americans in Bexar County is shown commencing on page 767 of 412 U.S., page 325, 37 L.Ed.2d, and consumes a substantial portion of the next page. Aside from a long history of denial of access to the political process, the Bexar County community (including the Mexican-Americans) " 'had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, *politics* and others.' " (quoting from the District Court's opinion at 343 F Supp, at 728) (emphasis added). There was a cultural and language barrier in an area of poor housing, low income and high rate of unemployment, and " 'the most restrictive voter registration procedures in the nation.' "

No factors comparable in the least to the conditions in Dallas and Bexar Counties, Texas existed in Fairfield, Alabama at the time of the 1968 election, or the 1972 election which is under attack in this case. All one has to do is to read the opinion applicable to the *Fairfield* case in that regard.

The voting system created by the Legislature for municipalities like Fairfield, §426, et, seq., Title 37, Alabama Code of 1958 (Alabama Code of 1940, as amended)[1] makes no provision for slating of candidates whatsoever and no nominations by any political party. Anyone who desires to run and is otherwise eligible may run for office by throwing

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[1]While the applicable Code section is purportedly set out in the petitioners' appendix at page 144, the reference there made is to a section of the Code of 1975, not in existence at the time of the 1972 election. However, the wording appears to be the same. Section 426, Title 37, numbered in the applicable Code, is referred to as such in all of the briefs throughout the course of the litigation. The correct citation is §426, Title 7, of the former Code, elsewhere referred to.

his hat in the ring. A further statement is made on page 7 of the petition in the Statement of the Case that after remand on the first appeal the District Court then made a finding of "ultimate fact" that plaintiffs had established a case of dilution of black voting strength under *White v. Regester*. This we shall controvert when we reach a discussion of the Statement of the Facts. The statement is incomprehensible and it does not present a legitimate question for review, respondents submit.

Respondents' view of the questions presented for review is whether the evidence was sufficient to show impermissible dilution under the Fourteenth or Fifteenth Amendments of the black voting strength. Integrally connected with that question is whether the findings of the District Court of June 11, 1976 (571 F.2d 209, set out as an appendix to the Court of Appeals opinion), described by petitioners as "Nevett B" and set forth commencing at page 59, petitioner's appendix, upon which was founded the judgment from which the appeal was taken, were clearly erroneous. The Court of Appeals held they were not.

The ultimate question is whether the plaintiffs have shown a reason for review under Rule 19, or otherwise. Respondents contend that no sufficient reason has been shown.

We have no complaint pertaining to the wording of Questions 3 and 4 relating to the subject whether there must be proof of an intent to discriminate against blacks as far as the abridgment of the right to vote is concerned under the Fourteenth and Fifteenth Amendments. Respondents contend, as held by the Court of Appeals, that purposeful discrimination is an essential element for success.

STATEMENT OF THE CASE

The Statement of the Case of the petitioners, on pages 5-10, contains for the most part, aside from the history of the litigation and the results of each proceeding, petitioners' interpretation as to what each *Fairfield* decision means, with much of which defendants disagree.

It is true that Fairfield is an industrial suburb of Birmingham, much of its population consisting of workers of the Tennessee Coal and Iron Company, a division of the U.S. Steel Corporation.

There is no claim that blacks were economically disadvantaged, or that there were poorer educational and economical opportunities or conditions.

At the time of the 1970 census preceding the 1972 election, the City had a population of 14,369, as stated, and six wards, with two councilmen residing in each ward, total of twelve, and the one president of the council, all to be elected by an at-large vote, and from numbered places, the candidates running for places 1 and 2 *in each ward*.

Petitioners state on page 5 that all blacks, while defeated at the polls in 1972 by a city-wide majority, usually carried their own wards. There is nothing in the record before this Court to show that that is a fact, and it must be borne in mind that in order for any candidate to be elected, his candidacy must be voted upon by all of the voters in the city, both white and black.

Under §426, Title 37, Alabama Code of 1940, as amended, applicable at the time, in cities with population of 12,000 or more, but less than 20,000, and having less than seven wards (Fairfield had six), it was mandatory that two resident aldermen or councilmen from each ward be elected by all of the voters of the city. In such cities having more than seven wards, one alderman would be elected from

each ward, and in such case a sufficient number of aldermen from the city at large would be elected to make the total number of aldermen fourteen, exclusive of the president of the council; and in cities having 50,000 population or more the city council may create not exceeding twenty wards, with other population provisions.

The cities were governed by different provisions according to their population and number of wards, as shown by the statute, and it is for that reason that the trial court, in its second judgment rendered on June 11, 1976 *(Nevett B,* 59a, better read in the appendix to 571 F.2d commencing at page 230), described the state's policy underlying the preference for the multi-member or the at-large districting as tenuous. Although the trial court decided that this one factor was shown, he effectively decided that the other main factors prescribed in *Zimmer (Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973)) had not been proven in the aggregate, including the enhancing factors, and that the plaintiffs had not made out a case for dilution, with judgment for defendants. While at page 227 in *Nevett v. Sides,* 571 F.2d, the opinion states that the appellees (defendants) "do not challenge the finding that the state policy behind at-large districting is tenuous", the Court is mistaken in that because on page 32 of the brief of appellees (defendants) we stated clearly our view that:

> ". . . the policy in favor of at-large voting is not 'tenuous' from the standpoint of Zimmer . . . 'Tenuous' means 'weak', 'flimsy' or 'without substance', according to the dictionary, but we submit that the meaning is to be considered in the light of 'racial' discrimination, under *Zimmer* definitions."

This is the construction placed upon the term in *Bradas v. Rapides Parish Police Jury,* 508 F.2d 1109, Fifth Circuit, February 14, 1975. After discussing the lack of existence

of the other factors in *Zimmer,* the Court, in *Bradas,* said (Judge Simpson):

> "The record does not evidence a state policy favoring multi-member districts that is rooted in racial discrimination, nor does it indicate a lack of responsiveness on behalf of elected officials to the particular concerns of the black community."

The District Court, following remand, held (briefly stated), pertaining to the four major factors in *Zimmer,* at p. 229, *Nevett v. Sides,* 571 F.2d:

1. Plaintiffs have not demonstrated any lack of access to the process of slating candidates, for in Fairfield there has been no slating. More to the point, the evidence has not shown that blacks in recent years have been denied access in any parts or phases of the election processes in Fairfield, e.g., qualifying as candidates, campaigning, voting (this includes registration, 59, 60a).

2. It has not been demonstrated that there has been "unresponsiveness" by City officials to the "particularized needs" of blacks (60a).

3. The Court held that the state policy pertaining to any preference for at-large voting in municipal elections is "tenuous", a matter which we have previously discussed.

4. Plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system.

After considering the "enhancing factors" the Court concludes that there was no proof in the aggregate, considering all factors, that there was impermissible dilution of black votes under the Fairfield election system (65a), and after noting that there has been no evidence that the "claimed dilution was the result of any invidious discriminatory purpose," Cf. *Washington v. Davis,* 426 U.S. 229,

96 S.Ct. 2040, 48 L.Ed.2d 577 (1976), rendered judgment for the defendants (65a).

Washington v. Davis was decided just prior to June 11, 1976, the date of the District Court's judgment.

Suffice it to say that whenever a small city, with population between 12,000 and 20,000, covering an area of three square miles, electing to have less than seven wards (having any more in a city of that size would be impracticable), the state law makes it mandatory that two councilmen from each ward (residing therein), and the president of the council (residing anywhere in the city), be elected by the voters at large. With all deference, we think the District Court misconstrued the term "tenuous" as used in *Zimmer*. However, because of the holding, both of the District Court and the Court of Appeals in their last two decisions, the meaning of the word "tenuous" in *Zimmer* is a matter of little import in our case.

The action was filed in 1974 and the first judgment of the District Court rendered on February 20, 1975 in favor of the plaintiffs. Its opinion is shown as Appendix A at the end of the opinion of the Court of Appeals rendered on June 8, 1976 (the case was argued in May 1976), *Nevett v. Sides,* 533 F.2d 1361 (appendix commencing at 1366). The opinion of the Court of Appeals in *Nevett v. Sides,* first appeal, was rendered on June 8, 1976. On June 11, 1976 there was a hearing before United States District Judge Sam C. Pointer, Jr. following remand, at which no additional evidence was taken and none requested. The councilmen whose offices were challenged in the suit were elected in August of 1972, and a new election was scheduled for August, 1976. The election was held and new councilmen were elected under the same plan and are now serving. The appeal from the District Court's judgment of June 11, 1976 was heard on June 13, 1977 before the Court

of Appeals and judgment and opinion affirming the District Court's judgment (571 F.2d 209) was rendered on March 29, 1978. This, of course, is the opinion which gave rise to the present petition for certiorari. This case does not involve any attack whatsoever upon the council elected in August of 1976, and the effect of the actions taken by that council, if it were held they were not validly elected, is almost unimaginable.

The course of this case has involved two trial court judgments, two opinions of the Court of Appeals, over a period of over four years, before reaching this Court.

On page 6 the petitioners state that the District Court, in the case on first appeal, found that the at-large election system, coupled with racially polarized voting, 'operate[s] to minimize or cancel the voting strength of the blacks in the City of Fairfield,' and that the District Court "made explicit findings under each of the criteria set out in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (enbanc) *aff'd sub. nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 6363 (1976), but found it necessary to return to the 'basic standards' of *White v. Regester,* 412 U.S. 755 (1973)." A portion of the quotation, that is, what the Court said, may be correct *(Nevett A,* 122a), but it is hardly accurate to say that the Court found it necessary to return "to the basic standards" of *White v. Regester.*

The District Court, as has been pointed out in the petition, stated that he considered what was said in *Zimmer* to be merely guidelines but, in effect, not binding, and he construed *White v. Regester* as meaning that the effect of an at-large election in which black candidates were not elected, although constituting a high percentage of the population, in itself constituted a dilution of the black vote. The trial judge made statements in his opinion to show that was the way he felt, and the Court of Appeals, at page

1365, 533 F.2d, characterizes the District Court's opinion as insufficient to support the judgment for the plaintiffs and, in effect, as misconstruing *White v. Regester*, saying:

> "As the Supreme Court said in *Dallas County v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 1708, 44 L.Ed.2d 312, 315 (1975):
>
> '[A] successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population.'
>
> Such findings must be based on the criteria that the *Zimmer* and *Wallace* courts distilled from *White v. Regester*, 412 U.S. 755, 765-767, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314, 324-325 (1973) and in accordance with all later cases. Unless those criteria in the aggregate point to dilution, i.e., if the criteria 'don't really help', then plaintiffs have not met their burden, and their cause must fail. Specifically, the trial court's findings may be read as indicating that elections must be somehow so arranged—at any rate where there is evidence of racial bloc voting—that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires. Therefore, we remand to the district court to reconsider its findings according to the indicia of dilution stated in *Zimmer* and other cases and to redetermine the ultimate question of dilution *vel non* in light of its conclusions with respect to these criteria."

With reference to the District Court's findings, actually favorable and certainly not unfavorable to the defendants, the opinion said (page 1364, 533 F.2d):

> "The relevant fact findings were either intermingled with or preceded Judge Pointer's conclusions of law. None of the findings of fact, considered separately from the intermingled conclusions of law, can be set aside as clearly erroneous."

While the District Court in his first opinion considered the criteria in *Zimmer*, finding none of them in favor of the plaintiffs, expressing doubt only as to the issue of unresponsiveness and stating that the criteria did not help one way or the other (although finding that there was no racially motivated law or action), his conclusion was that if the voting plan had the effect it had in the Fairfield situation, this was sufficient for a finding of dilution. Whatever was said in the first judgment, vacated by the Court of Appeals, was not sought to be reviewed here, and the time for review appears to have long ago expired.

On page 7 petitioners state that on remand the District Court made a "finding of 'ultimate fact' that plaintiffs had established a case of dilution of black voting strength under *White v. Regester* . . . . ", a remarkable statement indeed.

This was one of the questions that petitioners raised as being presented for review and accounts for our having quoted the findings in *White v. Regester*. Petitioners' attorneys are evidently referring to the language of the District Court in his second opinion, page 230, 571 F.2d, as follows:

> "When this court entered its earlier decision, it did so in the belief that 'dilution' was established upon proof that (a) in a city where blacks constituted a majority of the voters in some of the districts but slightly less than 50% of the voters for the city as a whole, (b) where voting rather strictly followed racial lines, (c) a 'winner-take-all' election system by at-large voting for numbered places resulted in practice (d) in an all-white governing body, (e) whose decisions, *though without indication of fraud or bad faith*, quite understandably tended to reflect their own perspectives and the attitudes of those who elected them, to

the relative detriment of the black minority, (f) including such matters as appointments to other boards and agencies of the city. The court was of the view that such evidence demonstrated that the black plaintiffs 'had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.' *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). The court thought that the factors outlined in *Zimmer* were to be taken as indicia of—but not necessarily the determinants of—'dilution'." (emphasis added).

We have underscored the words "though without indication of fraud or bad faith" which are in addition to words in the first opinion in which the court stated that the effect was the important thing and should govern, even though neither the state nor the city officials of Fairfield intended to discriminate (the substance of his words).

The gist of the trial court's second opinion was that under the evidence the aggregate of the factors prescribed in *Zimmer* had not been proved. The Court's last statement and holding was "there had been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose. Cf. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Judgment in favor of the defendants will be entered by separate order." *Washington v. Davis* was handed down a few days before the June 11, 1976 judgment.

Neither this finding nor any other language that the Court has used states that the Court has found as an "ultimate fact" that plaintiffs had established a case of dilution under *White v. Regester*. We invite petitioners to point out to us where those words have been used. Whether the District Court had correctly or erroneously construed the meaning of *White v. Regester*, he has still made no finding

of "ultimate fact", under *White v. Regester*, in any sense. The most that can be said is that petitioners evidently conceived that *White v. Regester* was to be construed as meaning that there need be no racial motivation in prescribing an at-large system, that if the result is that no black candidate is elected, this proves dilution.

Petitioners state, at page 8, that with the assistance of federal registrars blacks achieved during 1968 and for the election that year a 53% majority of registered voters, and elected six blacks (all that ran except for president of the council) to the thirteen member city council (undoubtedly with the bloc voting on the part of the blacks at that time they would have elected twelve candidates, exclusive of the president of the council, if that many had run), and they say that by 1972 blacks constituted 48% of the registered voters. While a statement to that effect was evidently made by the trial judge, 122a, this is effectively contradicted by other sources in the case. In fact, the blacks constituted a few more than 50% of the registered voters in Fairfield in the 1972 election. In characterizing the Court's determinations as to the percentage of registered voters, the Court of Appeals, in *Nevett v. Sides*, 533 F.2d 1365, in fn. 3, said:

> "The court determined that blacks represent 48% of the population in Fairfield and have *at least 50% of the registered voters*—while the figures show that blacks have 500 fewer registered voters, the lower court found that since federal registrars registered 585 voters under the Voting Rights Act, most of those presumably black, blacks have at least as many, if not more, registered voters now; that blacks had won six of the thirteen council positions in 1968, which was the first time, with one exception, that any black had won a position on the council; that no blacks won in 1972, but that if blacks had voted in the same percentage as whites, they would have elected nine council members (assuming bloc voting); and that there has been sub-

stantial bloc voting. The foregoing is paraphrased from the Appendices." (emphasis added).

This footnote in *Nevett v. Sides (Nevett I)* as to the additional 585 votes in the 1972 election, presumably black, was in all probability taken from the evidence in the first trial, and a statement made therein by the district judge.

On pages 60 and 61 of the appendix in the Court of Appeals in the testimony of Jerry D. Coleman, plaintiffs' witness, he counted the number of white and black registrants comprising categories 1, 2, 3 and 4, the regular registration lists, as showing a total number of 3,794 whites and 3,212 blacks, at the time of the 1972 election, a total of 7,006. However, in categories 5 and 6, representing federal examiner registrants, there were 585 additional, presumably black. On page 75, the trial judge pointed out that to the regular total of 7,006 must be added the 585 registered federally, which would demonstrate that at least 50%, actually slightly more, of the registered voters were black in 1972.

This statement will be included in an appendix to this brief, certified by counsel, which we hope will be acceptable to the Court.

On page 10 of petitioners' statement there is a complaint of discrimination against blacks in employment, stating that only "one to three blacks out of sixty employed *among civil service,*" including firemen and policemen, were employed. This overlooks the fact that these are "classified employees" within the meaning of Act 248, Alabama Acts of 1945, creating a Personnel Board for all communities in counties of 400,000 or more in population (including Jefferson County) (see Appendix 1 to this brief), prescribing that applicants to all classified positions (civil service) must take examinations and only three of the applicants for the position are submitted by the Personnel Board to the appointing authority (in this case, the City of Fairfield) for a position, which is confined to choosing one of the three. The District Court pointed to this fact, that is, the authority of the "civil service" board, page 118a, and stated:

> "Of course there are problems that the city has brought out about some of its hiring policies, and many of them are very dependent upon what some other agent, namely, civil service, may do. Evidence indicated only in one instance has there been a black on the qualification list who has been passed over in recent years in favor of a white."

He undoubtedly had in mind this statutory restriction governing appointment of classified employees by the City. Policemen and firemen, as are all city employees not defined in the Act as unclassified, are under civil service.

Accordingly, the Court would not have been justified in saying, if he had done so, that as of 1968 and 1972 there was discrimination in employment on the part of the officials of the city as to civil service employees (the only complaint made). No such finding was made after the remand.

On the first hearing (122a), the District Court concluded that he:

> ". . . ends up with the proposition that the various standards and indicia that have been prescribed by the appellate courts are not helpful one way or the other in this case. And it ends up with this Court having to decide under the basic standards, does the present system, *regardless of purpose*, operate to minimize or cancel the voting strength of the blacks in the City of Fairfield." (emphasis added).

On account of such an opinion the judgment was reversed, the Court of Appeals reasoning that the trial court's findings were insufficient to support the judgment for plaintiffs and holding that none of them was clearly erroneous (although the opinion below dealt with all of the

major factors in *Zimmer),* characterized as being in favor of defendants with the "possible" exception of "unresponsiveness".

How can it be logically contended that the trial court, after remand, made, or purported to make, or had the authority to make, any such finding of "ultimate fact" under *White v. Regester,* having made findings and rendered judgment for defendants? The facts in the two cases were entirely different and the most that can be said is that the District Court, in the first hearing, construed or interpreted *White v. Regester* as meaning that even in the absence of fraud and without racial motivation, the effect of the result of the election itself showed invidious discrimination and dilution.

Arguing that the District Court found a discrimination to making appointments so that boards would become majority dominated by blacks, petitioners state in the last sentence on page 10, that "These findings on responsiveness were affirmed." The record does not show that there was any affirmance at all.

We think the other matters in petitioners' Statement of the Case have been sufficiently answered.

ARGUMENT IN OPPOSITION TO REVIEW BY CERTIORARI AND THE GRANTING OF THE WRIT

Petitioners' prime reasons are given as I and II. The first, p. 11, is:

I. The Court of Appeals opinions here departed from *White v. Regester*, 412 U.S. 755 (1973), and other holdings of this court.

The first subdivision under I is entitled:

A. *Fifth Circuit precedent since White v. Regester,* and petitioners state thereunder that the Supreme Court has dealt with the constitutionality of multi-member districts in only two cases, *White v. Regester,* 412 U.S. 755 (1973) and *Whitcomb v. Chavis,* 403 U.S. 124 (1971). There is a statement as to what *White* held, p. 11, and that statement in no wise conflicts with the opinion facts or principles involved in *Nevett v. Sides.*

We submit that *Whitcomb v. Chavis* has little, if any, effect upon the issues in the case now before the Court.

We do not perceive that anything in substance will be accomplished by a discussion of the Fifth Circuit opinions cited, as all preceded *Nevett v. Sides* now before the Court.

On page 14, the petitioners say that *Kirksey,*[2] in considering the effect of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan* (dealing with the factor of intent of purposeful discrimination, we suppose), concluded:

> " 'the Dallas and Bexar County plaintiffs in *White v. Regester* were successful, even though they did not prove the plan in question was a *Gomillion v. Lightfoot* [364 U.S. 339 (1960)] type of racial gerrymander, because they established the requisite intent or purpose in the form of the existent denial of access to the political process. 554 F.2d at 148.' "

We have little doubt that a persistent denial of access to the political process is to be inferred or presumed to be purposeful and we have no comment to the contrary.

No such element exists in *Nevett v. Sides,* according to all the findings of fact in the district and appeal courts decisions.

I-B, p. 15, of the petition contends that the Court of Appeals failed to apply the law of burden shifting as required

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[2]559 F.2d 139 (5th Cir.) (en banc), *cert. denied,* 434 U.S. 968 (1977).

by *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977).

The holding in that case is sufficiently set out in the initial statement preceding the headnotes.[3]

This holding, we submit, bears no analogy to *Nevett v. Sides,* on the facts or the question of burden of proof in this case.

On page 15, same topic, is the following statement pertaining to *White v. Regester* and *Whitcomb v. Chavis*:

> "*White v. Regester,* 412 U.S. 755 (1972), and *Whitcomb v. Chavis,* 403 U.S. 124 (1971), indicate that the order of proof in challenging an at-large system is that plaintiffs need to show:
>
> '1. racially polarized voting that, combined with the at-large system, operates to deprive the minority of the seats it could be expected to win with single-member districts.
>
> 2. That blacks have had less opportunity than did other residents to participate in the political process.' "

We find no such supporting statements in these cases on that score, and respondents do not conceive that any more

[3]"An untenured teacher, having been discharged from his employment, brought an action against his former employer for reinstatement and damages, claiming that the school district's refusal to rehire him violated his rights under the First and Fourteenth Amendments. The District Court found that the teacher's exercise of his right of free speech had played a substantial part in the board of education's decision not to rehire the teacher, and that he was entitled to reinstatement with back pay, and the Court of Appeals, 529 F.2d 524, affirmed. The Supreme Court, Mr. Justice Rehnquist, held, inter alia, that the fact that constitutionally protected conduct played a substantial part in the decision not to rehire the teacher did not necessarily amount to a constitutional violation justifying remedial action, and that the district court should have gone on to determine whether the board of education had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct by the teacher.

Vacated and remanded."

explicit answer is required in regard to the bare unsupported conclusion drawn by petitioners.

We are unable to ascertain where *Gaffney v. Cummings*[4] has any application to the subject. As to *Kirksey,* in *Nevett v. Sides,* the case on review, the Court of Appeals has observed no obstacle therein. *Kirksey,* in reality, applied to a system that was already court-established, and in any case, there is a wide divergence in the facts of the two cases. Furthermore, it precedes *Nevett v. Sides,* 571 F.2d 209, with which we are now concerned.

The last subdivision (C) of I, on page 19 of the petition, asserts that the Court failed to apply the "strict scrutiny" test to the evidence as required by this Court, citing *Reynolds v. Sims,* 377 U.S. 533 (1964) (a reapportionment, one-man, one-vote case, dependent purely on statistics and disparity in district population), and other cases, or "where there is proof of racial discrimination", citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252.

There is no need further to deal with *Reynolds v. Sims,* and as to *Arlington Heights* we can only say that there is no proof of racial motivation under the decisions in *Nevett v. Sides.*

On page 21 of the petition it is stated that the ultimate conclusion as to whether unconstitutional dilution exists is not subject to the "clearly erroneous rule", citing *Neil v. Biggers,* 409 U.S. 188, 193, 93 S.Ct. 375 (1972).

Neil v. Biggers has nothing to do with voter dilution. It invokes a habeas corpus proceeding involving an effort to attack the admissibility and effect of an identification of defendant in a criminal rape charge. There it was argued that the Supreme Court should not depart from its "long established practice not to reverse findings of fact concurred

[4]412 U.S. 735 (1973).

in by two lower courts unless shown to be clearly erroneous". The Court recognized this as a salutary rule not to be overturned where applicable, fn. 3, p. 379, 93 S.Ct., but said that the rule is "inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." In an opinion (one of the opinions) it was stated that the situation constituted "an unjustified departure from our long established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous", citing at least seven decisions commencing with *Blau v. Lehman,* 368 U.S. 403, 82 S.Ct. 431, 454-455, and ending with *Boulden v. Holman,* 394 U.S. 478, 480-481, 89 S.Ct. 1138-1140, 22 L.Ed.2d 433.

Respondents submit that this long-established rule applies to the case at bar, involving essentially factual findings by the U.S. District Court and the Court of Appeals, and not clearly erroneous, a salutary reason for declining to review the subject case on certiorari.

In view of the discussions in the District Court and Court of Appeals pertaining to the "enhancing" factors, which do not in themselves show "invidious discrimination", something should be said.

The "majority vote" requirement is discussed by the District Court at 62a, and the "anti-single shot" provision and numbered position approach are discussed at pp. 62 and 63a. The District Court found that they did not affect his conclusion that the "aggregate" of the facts under *Zimmer* had not been proved.

In 1961, Alabama abolished all anti-single shot provisions. The Act (Act No. 221, General Acts of Alabama of 1961) has been previously quoted.

There is a majority vote requirement for each place, but where there are two or more candidates, none receiving a

majority in the first election, a run-off election is held between the two candidates receiving the highest number of votes (Title 37, §34(54), Alabama Acts of 1961, No. 36, p. 856, Title 37, §34(54), 1958 Code, as amended, Pocket Part). Frankly, we see nothing invidious or insidious about this.

As far as running for Place I and Place II in the *same ward,* two councilmen being required to be elected, there is no anti-single shot provision, and the places are restricted to each ward. We perceive nothing invidious about this. All voters, or group of voters, may concentrate on voting en masse for and electing any one candidate for any place in any ward, all city voters voting at large. The anti-single shot provision applies to places in each ward and all other offices.

The District Court had held in its first decision that the predecessor of §426, Title 37, passed by the Legislature in 1909, or in any case the particular provision specifying at-large elections in cities of less than 20,000, had no racial overtones. "This was a reasonable hypothesis", said the Court (see District Court opinion in *Nevett v. Sides,* 533 F.2d at page 1371). The Court of Appeals, 571 F.2d at p. 221, accepted this finding, "that the 1909 plan was adopted without discriminatory intent", and, of course, affirmed the judgment for defendants.

Pertaining to the rationale of at-large elections in municipal elections, the Fifth Circuit, in *Wallace v. House,* 515 F.2d 619 (1975), said, at page 633:

> "The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties . . . we cannot say that the rationale is so tenuous that it can be disregarded. Nor have plaintiffs demonstrated that the at-large device

here was conceived as a tool of racial discrimination as appeared to be the case in *Zimmer* and *Turner*."

This demonstrates the meaning of the word "tenuous" used in dilution cases, as well as a logical reason for such a system.

After discussion of *Zimmer* and the factor of "intent as an element", the Court concludes (p. 229, 571 F.2d):

> "Under these particular circumstances, the district court's conclusion that 'there has been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose' (citing *Davis*) is wholly warranted. The failure to establish the existence of intentional discrimination follows naturally from the factual determinations under *Zimmer* in this case.
>
> This case, then, falls squarely within the principle established in *Wright* and reaffirmed in *Davis* and *Arlington Heights*. In the aggregate, the *Zimmer* criteria do not point to a racially motivated dilution. Absent a showing that intentional discrimination was a motivating factor in either the enactment or maintenance of the plan, these appellants cannot succeed.
>
> The district court's judgment is therefore AFFIRMED."

Petitioner's second reason, given as No. II, pp. 21-28 of petition, is:

II. Review should be granted to decide the necessity and nature of proof of intent in cases alleging dilution of a racial group's votes.

In response to the argument under this reason, respondents commend that portion of the opinion of the Court of Appeals commencing with II on p. 217, 571 F.2d, and ending near the bottom of page 225, holding that an at-large plan must be shown to be racially motivated as a prerequisite to a successful attack, both under the Fourteenth

and Fifteenth Amendments, approving, inter alia, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977), as applying to the Fifteenth Amendment, as well as the Fourteenth, in a dilution case.

On page 21, petitioners state that *Wright v. Rockefeller* does not require proof of intent. This was a gerrymandering case and the majority opinion held that the plaintiffs had not met the burden of proof that the districting was racially motivated. Petitioners' statement is perplexing.

We also cite *Dallas County, Ala., et. al. v. Reese*, et al., 421 U.S. 477, 44 L.Ed.2d 312, 95 S.Ct. 1706, and *Dusch, et al., v. Davis, et al.*, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554, Fourteenth Amendment voter dilution cases which come very close to saying, if not categorically, that the discrimination must be intentional. They are not race cases but involve claimed dilution of white voters rights.

It is interesting to note the statement made in *Whitcomb v. Chavis*, strongly relied upon by petitioners, as follows (at p. 149, 403 U.S. 148, at p. 1872 of 91 S.Ct.):

> "First, it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination."

Justice Stewart, in a concurring opinion in *United Jewish Organizations, etc. v. Carey*, 430 U.S. 144 (1977), 97 S.Ct. 996, at page 1017, said:

> "Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washing-*

> *ton v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597. Disproportionate impact may afford some evidence that an invidious purpose was present. *Arlington Heights v. Metropolitan Housing Development Corp.,* ____ U.S. ____, 97 S.Ct. 555, 50 L.Ed.2d ____, *ante,* p. 1016."

Under our view, there should be no difference between the protection afforded under the Fourteenth Amendment and that under the Fifteenth, of the right to vote.

Respondents assign the following reasons for the Court's refusal to review the Court of Appeals in this case by grant of the writ pursuant to Rule 19:

1. The Court of Appeals has not rendered a decision in conflict with the decision of another court of appeals on the matter, has not decided an important question of federal law which has not been and should be settled by this Court, and has not decided a federal question in a way which is in conflict with applicable decisions of this Court.

2. Furthermore, to grant the writ would constitute an unjustified departure from the Court's long standing practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous.

3. By way of a specific objection to a review and attack upon the opinion and judgment of the Court of Appeals rendered on June 8, 1976 in *Nevett v. Sides,* 533 F.2d 1361, respondents assert that the petition for review is not filed within the time prescribed by statute, §2101 (c) , Title 28, of the United States Code.

We, of course, do not know what view this Court will take pertaining to the Fifth Circuit factors or guidelines established in *Zimmer* and the other decisions of the Fifth Circuit. Respondents assert, however, that if the rule of *Zimmer* is to govern, defendants have met the test under findings of fact that are not clearly erroneous, regardless of

the question whether purposeful discrimination is essential. If such factor is essential, the District Court's findings of June 11, 1976 enunciate the presence of such a factor.

CONCLUSION

Respondents, defendants below, pray that the petition for certiorari be denied and the writ not issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of November, 1978, three (3) true and correct copies of the foregoing Brief of Respondents in Opposition to Review of the Cause sought by Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on counsel for petitioners by depositing the same in the United States Mail, with Air Mail postage prepaid, and addressed to the respective parties at their post office addresses as follows:

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REID B. BARNES

APPENDIX I

PERTINENT PORTIONS OF ACT NO. 248, GENERAL ACTS OF ALABAMA OF 1945, ESTABLISHING A PERSONNEL BOARD IN EACH COUNTY IN ALABAMA HAVING A POPULATION OF 400,000 OR MORE, AND PROVIDING, INTER ALIA, FOR THE APPOINTMENT OF CLASSIFIED (CIVIL SERVICE) EMPLOYEES IN THE COUNTY AND ALL MUNICIPALITIES THEREIN.

Section 2. Personnel Board; extent of its authority defined. In and for each separate county of the State of Alabama which has a population of four hundred thousand or more people according to the last or any future federal census, there shall be a personnel board for the government and control by rules and regulations and practices hereinafter set out or authorized of all employees and appointees holding positions in the classified service of such counties and the municipalities therein whose population according to the last federal census was five thousand or more, and the County Board of Health, and such personnel board is vested with such power, authority and jurisdiction. Provided, however, that such board shall not govern any officers or appointees holding positions in the unclassified service. . . .

* * *

Section 18. Appointments. Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion. Whenever a vacancy in an existing position is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position, and if requested by the director to do so, the duties of the position and desired qualifications of the person to be appointed, and a request that the director certify to him the names of per-

sons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy, or all the names on the register if there are fewer than three . . . Within ten days after such names are certified the appointing authority shall appoint one of those whose names are certified to each vacancy which he is to fill. . . .

NOTE: Policemen and firemen are classified employees within the meaning of the Act.

APPENDIX II

The undersigned attorney for respondents certifies that, as shown in part on pages 60 and 61 of the appendix in the United States Court of Appeals for the Fifth Circuit, submitted as a part of the record in *Nevett v. Sides,* 571 F.2d 209, witness Jerry D. Coleman testified that the total number of white registered voters for the City of Fairfield in 1972 was 3,794 and the blacks, 3,212, appearing on the regular registration records of the county, a total of 7,006; and also testified that, in addition thereto, there were 585 voters registered in categories 5 and 6. On page 75, the trial judge, Honorable Sam C. Pointer, Jr., made the following statement in open court: (same appendix on both appeals):

> "I believe that the 7,006 merely gives categories 1, 2, 3 and 4, and you would have to add another 585."

Attached hereto are true copies of pages 60 and 61, showing what has been said above, and also page 75, showing the Court's statement.

See opinion in *Nevett v. Sides,* 533 F.2d, at page 1365, characterizing the 585 voters as being those registered by federal examiners (presumably black).

The District Court, in his opinion, at p. 1367, 533 F.2d, "assumes" that of "persons who were registered under the Federal Registration Voters Procedure, virtually all of those were black."

(s) REID B. BARNES

[96] THE COURT:

To vacancies, and one of the five members for the citizens advisory committee?

A Yes.

* * * *

JERRY D. COLEMAN,

* * * *

and black.

Q District 1, white, 1,141; blacks, 217.
District 2, white, 129; blacks, 2,906.
District 3, white, 2,524; blacks, 89.

Q Now what was the total number of whites for the city?

A The total number of whites for the city was 3,794. The total number of blacks was 3,212.

Q What is the difference between blacks and whites?

A A difference of 582.

Q Now were the number of — were the 5's and 6's included in those racial breakdowns?

A 5's and 6's were included.

Q How did you go through and identify those people as black or white that were listed as 5's or 6's?

A I didn't identify the 5's and 6's as either being black or white.

Q You just told me that they were included in this breakdown? [111]

[111] A They are included in the overall figure, but not racially.

Q Oh, I'm sorry, excuse me.

All right. Did you go through and count up the number of 5's and 6's on that list?

A Yes, I did.

Q And how many 5's and 6's are there as a total in the July, 1972 list?

A 5's and 6's total 585.

Q All right. Now did you also go through the June 1974 voting list?

A Yes, I did.

Q All right. Would you give us the black-white breakdown for each district at that time?

A District 1, white, 1,036; black, 228.
District 2, white, 95; black, 2,833.
District 3, white, 2,594; black, 88.
Total citywide, white, 3,725; black, 3,149. The difference of 576.

Q All right. Did you go through that list and count up the number of people who were 5's and 6's?

A June, '74?

Q Yes, sir.

A No, I didn't for June of '74.

Q At the end of the list that was provided to you by [112] [170] of education .

Q And when was that?

A This was during the vacancy, one of the vacancies. I don't recall which vacancy.

Q Was this before '72 or since '72?

A It has been since '72.

Q Since this present council has been in office?

A Let me be sure. I believe it was during this present council.

Q You think it was during this present council?

A Yes.

Q Was that when Ms. Coleman's position came open?

A I don't recall which position it was. But I did submit a letter.

Q Was it when the council first was organized or first went into office?

* * * *

that as a category as 5 and 6?

MR. BARNES:

Well, they have—

THE COURT:

I believe that the 7,006 merely gives categories 1, 2, 3 and 4, and you would have to add another 585.

MR. BARNES:

Maybe you would have to add those. But whether you had [203].

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

vs.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS IN OPPOSITION TO REVIEW BY CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents conceive that the petitioners' reply memorandum transcends mere matter in reply to respondents' brief in opposition and introduces new matter which, according to a proper interpretation of Rule 24 (b), justifies the presentation of a supplemental brief.

Primarily, under III on page 4 of the reply, petitioners urge review of *Nevett v. Sides* because of this Court's noting of probable jurisdiction in *City of Mobile v. Bolden*, 77-1844, on Oct. 2, 1978, 571 F.2d 238, Fifth Circuit (423 F.Supp. 384, D.C.). While this noting occurred after the filing of respondents' brief in opposition, it was a matter

not appropriate for respondents to mention until and unless presented by petitioners.

In *Bolden* (Mobile), the District Court concluded (right or wrong) that Mobile's form of commission government, coupled with factual discrimination in every conceivable respect, effected impermissible dilution of the black vote, and ordered a new court-created mayor-council form of government, a judgment affirmed by the Court of Appeals from which Mobile appealed to this Court. Petitioners concede that both the District Court and Court of Appeals in *Nevett II* (our case) held that there was an absence of intent to dilute.

We fail to understand petitioners' reasoning in the claim that *Bolden* (Mobile) could be resolved without resolution of whether or not intent to discriminate is a necessary element, but that this would not necessarily resolve the *Fairfield* petitioners' contention that the Court of Appeals' opinions were inconsistent with *White v. Regester*. The District Court, in the first *Nevett,* construed the Court of Appeals as erroneously interpreting *White v. Regester* to mean that dilution existed if the mere *effect* of the at-large election in itself resulted in depriving blacks of electing representatives, even though without design, without regard to the factors enumerated in *Zimmer;* hence, the vacation and the remand following the opinion of June 8, 1976.

The District Court's factual finding on remand that there was not a sufficient showing of invidious discriminatory dilution has been held by the Court of Appeals in the last *Nevett* decision to be not clearly erroneous, affirming the judgment below.

The last sentence of the District Court's second opinion (Petitioners' Appendix, at p. 65) demonstrates that the Court adjudged the evidence to be insufficient to show impermissible dilution without regard to the last sentence which was apparently added purely from the Court's very recent reading of *Washington v. Davis.* We quote the paragraph:

> "Even when 'enhanced' by two or possibly three of the 'extra' factors, proof of factor (3) is insufficient 'in the aggregate' under these criteria to establish a case of 'dilution.' Accordingly, the court finds and concludes that there has not been proved an impermissible dilution of black votes under the existing Fairfield system. It may be noted that there has been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose. *Cf. Washington v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)."

The great differences in the evidence and facts, and the results, in *Nevett* and *Bolden* are so vast that there is no logical reason to use the *Mobile* case as a reason for determining that the *Fairfield* case should also be reviewed.

Under II, "Factual Matters," petitioners contend that respondents attempted to pass the responsibility for the low number of black city employees to the personnel board (p. 3).

Respondents' brief makes this point, at p. 2, and the Jefferson County Personnel Board hiring procedure statute (including hiring for municipalities) is quoted (pertinent parts) in our brief appendix, p. 31. What we have contended is unassailable — the City can hire only a Civil Service employee certified by the board from a list of three; supposedly these three having the highest marks on the personnel board examinations, including policemen and firemen.

The City has no control or influence over the Civil Service Board, and if the District Court did not make this clear it was through inadvertence or misunderstanding.

On p. 4, petitioners cite *Hendrix v. McKinney*, M.D. of Ala., No. 74-264-N. We have obtained a copy and find that it involved a suit against the Montgomery County Commission, the governing body of the county (the county has no personnel board for county or city employees). The case has no bearing whatsoever on the case at bar. If this were a suit against the personnel board claiming irregularities in certifying applicants for appointment, the case would be different. However, all that Fairfield can do is to select one of the three candidates certified by the personnel board under the statute.

The only statement made by petitioners having any possible relevance to the subject is (p. 3):

> ". . . the record in the case shows that the city council refused to hire a black who was one of the three persons certified by the Personnel Board to the City for a clerical position. 118a."

What the District Court said about this was (118a):

> "Evidence indicated *only in one instance* has there been a black on the qualification list who has been passed over in recent years in favor of a white." (underscoring ours)

This, of course, indicates there were other instances where blacks were not turned down. Surely petitioners do not contend that the failure to hire a black only in one instance in itself shows a reason for reconstructing the election system of the city.

As to the statement made on page 3 by petitioners that there is nothing in the record (now) before the Court to substantiate the assertion by petitioners that black candidates usually carried their wards, we were correct in that statement. Nothing was before the Court and actually is not now before the Court. There is only a conclusion by

petitioners' counsel that by ward vote blacks "won or tied in wards 1, 2 and 5, out of the six wards." In any case, if this were the case, this would not alter the situation, the voting being at large, with a wide disparity in the population of the wards, a situation which is held to be immaterial according to *Dallas County, Ala., et al. v. Reese, et al.*, 421 U.S. 477, 44 L.Ed.2d 312, 95 S.Ct. 1706, and *Dusch v. Davis*, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554, in the absence of evidence of invidious discrimination.

The political status in *Fairfield* as far as its council is concerned, uncertain as a matter of long standing because of this litigation, should be stabilized as quickly as possible. An entirely new council is in office (1976 election), is not the subject of attack, and an entirely different situation, we submit, now exists. Respondents urge that the Court decline to review *Nevett v. Sides*.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

In their Opposition, the respondents raised two factual points deserving of a reply (though not dispositive of the case), and a challenge to the petitioners' right to seek certiorari on what respondents claim was decided in an earlier appeal.

I. REVIEW IS PROPERLY SOUGHT OF LEGAL CONCLUSIONS AND FACT FINDING REACHED IN THE FIRST APPEAL AND ADOPTED BY REFERENCE OR SUB SILENTIO IN THE SECOND APPEAL.

At several places in the Opposition, respondents argue that the petitioners have waited too late to seek review of the Nevett I decision of the court of appeals. Petitioners therefore should make it clear that they are not seeking review of Nevett I, except to the extent that its reasoning was adopted by Nevett II.

The first opinion ended in a judgment that "remand[ed] to the district court to reconsider its findings." 102a. That was not the type judgment for which review should be sought in this Court. But the second opinion relied at certain points on the first opinion, e.g., 50a.

In at least one important respect, the second opinion relied upon what petitioners assert is a mistaken factual determination in the first appellate decision. See 5a, n. 6, where the court of appeals asserted that blacks constituted 50 per cent of the registered voters in 1970. Petitioners sought review of both opinions and judgments, Petition, 1, so that they would

not be foreclosed from challenging anything in the first opinion which might be argued to be binding as the law of the case.

II. FACTUAL MATTERS.

The respondents erroneously claim, Opposition, 9, that there "is nothing in the record before this Court to show" that black candidates usually carried their own wards in the 1972 elections, even though they were defeated at large. But the official canvas of the 1972 election was introduced at trial and is reproduced in the court of appeals' appendix, 26-27. This exhibit shows that black candidates won or tied in Wards 1, 2 and 5.

The respondents have also attempted to pass the responsibility for the low number of black city employees to the Personnel Board, an independent agency. Petitioners might note that the Board is presently under federal court orders (issued subsequently to the trial of this case) to cease discrimination against blacks and women through the use of non-validated testing procedures. Even beyond that, the record in the case shows that the city council refused to hire a black who was one of the three persons certified by

the Personnel Board to the City for a clerical position. 118a.

But even without direct control, the respondents may not so easily avoid the responsibility for the great racial disparity in its employment practices. In a suit against the Montgomery County, Alabama, Commission, the elected officials made a similar argument regarding employment by a sheriff. Judge Frank M. Johnson, Jr., made the following finding:

> That the Commission lacks legal authority to control the Sheriff does not mean that it lacks influence. There is no evidence, however, that the Commission has exercised that influence to represent the interests of its black constituents. . . .There can be little doubt that a Commission responsive to the black community would have been less passive and more diligent in its supervision. Hendrix v. McKinney, ___F.Supp. ____, Civil Action No. 74-264-N (M.D.Ala. Nov. 15, 1978), p. 13.

III. PETITIONERS URGE REVIEW HERE BECAUSE OF THIS COURT'S DECISION TO HEAR ARGUMENT IN CITY OF MOBILE V. BOLDEN, NO. 77-1844.

Subsequent to the filing of the petition here, this Court noted probable

jurisdiction in City of Mobile v. Bolden, No. 77-1844, 99 S.Ct. 75 (1978). Bolden was decided with Nevett by the same panel of the court of appeals. In fact, the explication of law applicable to both cases was written in the Nevett opinion.

While Bolden presents additional issues regarding the commission form of government, the decisions are quite similar. The basic difference is in the result--Bolden found intentional discrimination; Nevett II did not. Bolden could be resolved without resolution of whether or not this is a necessary element of proof in dilution claims, and would not necessarily resolve petitioners' contention that the court of appeals' opinions were inconsistent with White v. Regester, 412 U.S. 755 (1973). Petitioners suggest that the Court would benefit from the joint consideration of these cases, now in differing postures, and urge review be granted herein.

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